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An Emerging International Criminal Law Tradition: Gaps in Applicable Law and Transnational Common Laws

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**An Emerging International Criminal Law Tradition:
Gaps in Applicable Law and Transnational Common Laws**

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Degree of Master of Laws

Institute of Comparative Law, Faculty of Law

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A C K N O W L E D G E M E N T

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A B S T R A C T

This thesis critically examines the origins and development of international criminal law to identify the defining features of this emerging legal tradition. It critically evaluates the experimental approach taken in Article 21 of the Rome Statute of the International Criminal Court, which attempts to codify an untested normative super-structure to guide this legal tradition.

International criminal law is a hybrid tradition which seeks legitimacy and answers to difficult questions by drawing on other established legal traditions. Its development at the confluence of public international law, international humanitarian law, international human rights law and national criminal laws has resulted in gaps in difficult cases with no clear answers. These lacunae have been filled by recourse to judicial discretion, exercised consistent with Patrick Glenn's theory of transnational common laws, and by privileging one of the competing aims of international criminal law: enhancing humanitarian protection versus maximizing fairness to the accused.

A B R É G É

Cette thèse porte un regard critique sur les origines et le développement du droit pénal international afin de mieux cerner les éléments caractéristiques de cette tradition juridique émergente. Il s'agit d'une évaluation critique de l'approche expérimentale proposée par l'Article 21 du Statut de Rome de la Cour Pénale Internationale, qui vise à codifier une superstructure normative innovante afin de mieux asseoir cette tradition juridique.

Le droit pénal international est une tradition hybride qui cherche une légitimité et qui cherche à apporter des réponses à des questions complexes en s'inspirant d'autres traditions juridiques établies. Son développement à la confluence du droit international public, du droit international humanitaire, des droits de l'homme et des législations pénales nationales, a abouti dans certains cas à un vide juridique et des réponses imprécises. Ces lacunes ont été comblées par le recours au pouvoir de discrétion judiciaire, exercé selon la théorie de droit communs transnationaux avancée par Patrick Glenn. Elles ont également été comblées en privilégiant l'un des deux objectifs mis en concurrence par le droit pénal international, à savoir privilégier la protection humanitaire ou renforcer le droit de l'accusé à un procès équitable.

I N T R O D U C T I O N

International criminal law has only recently emerged as an independent field of study, practiced by few but closely watched by many. Today, the International Criminal Court (ICC) is an ambitious project that raises complex questions that legal practitioners and scholars are only beginning to appreciate. While the path towards a permanent international criminal court was long, the haste with which the Rome Statute creating the ICC was negotiated leaves lingering concerns about whether this infant institution will be able to achieve the lofty aims of its framers. Foundational to the legitimacy and viability of this judicial institution is the way that it recognizes, interprets and applies norms and rules in the still developing area of international criminal law.

This thesis aims to critically examine the historical origins and contemporary development of international criminal law to identify the defining features of this emergent legal tradition, and to evaluate the new approach taken in Article 21 of the Rome Statute of the ICC in attempting to codify a normative super-structure to guide this legal tradition moving forward. This inquiry involves the most practical of substantive, procedural and evidentiary issues, as well as the most theoretical questions related to the nature of law and judicial decision-making.

It will be argued that international criminal law is a hybrid tradition in which the constant tension between divergent sources of law are resolved in difficult cases not by resorting to well-established doctrines of public international law as often claimed, but rather by judicial discretion. This discretion is often exercised in a manner which is consistent with Patrick Glenn's theory of transnational common laws which posits that persuasive, non-

binding norms that transcend national laws operate in the background and may be drawn upon to address gaps in applicable law. This thesis will further argue that one of the principal persuasive reasons for opting to follow one transnational common law over another is based on favoring one of the fundamental tensions in the international criminal law tradition (e.g. humanitarian protection versus fairness to the accused). In the final analysis, it will be submitted that Article 21 of the Rome Statute, which purports to define ‘applicable law’ for resolving questions of international criminal law, carries the serious risk of being indeterminate, and inconsistently applied by authorizing the possibility of different norms applying to different accused – a troubling concept in criminal proceedings. It also opens the door wide open to judicial activism in ways not fully appreciated by the negotiators of the Rome Statute who generally intended to limit the scope of judge-made law in comparison to the legacy and modern *ad hoc* tribunals.

In Chapter 1, the origins of the international criminal law tradition will be explored up to the end of the post-WWII period. This analysis will focus on how this tradition has struggled to define its sources of law and methods of interpretation, as well as the impact of institutional design on the development of this tradition. Some of the early defining features of this tradition will be identified so that their growth or decline may be more fully understood as the tradition’s progress is tracked.

Chapter 2 will critically examine the development of the international criminal law tradition at the modern *ad hoc* tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ability of these tribunals to identify applicable sources of law in difficult cases, and to

deal with fundamental tensions in this legal tradition, will be examined. An analysis of the jurisprudence of these tribunals, where gaps in the applicable law have arisen, will be undertaken in order to identify the theoretical means by which this legal tradition has sought to reconcile competing sources of law from different legal traditions. Patrick Glenn's theory of transnational common laws will be introduced as offering a persuasive explanatory theory for the actual operation of judicial decision-making in difficult cases before these tribunals.

Finally, Chapter 3 will apply these historical and contemporary insights to the applicable law and institutional design of the ICC as the first permanent international criminal court and sustainer of this legal tradition moving forward. For the first time in history, Article 21 of the Rome Statute of the ICC purports to delimit the sources of international criminal law in an international treaty. The provision is not the progeny of the common law, civilian or public international law traditions entirely, despite drawing some inspiration from them. Rather, it is an untested and theoretically incoherent new articulation of what law is and how it may be found. As with any legal order, Article 21 claims to offer an answer to questions that are not addressed in formal legal sources (i.e. the Rome Statute, Rules of Procedure and Evidence, Elements of Crime, and relevant treaties). Given that the ICC is an adjudicative body without a complete code to apply, there must be answers to questions unaddressed in these formal sources – but where do they come from, and how will judges go about finding them? Does Article 21 of the Rome Statute provide a sufficient basis for determining practical matters that will come before the ICC, and, more fundamentally, does it provide an underlying structure for an international criminal law tradition? These are the questions that this final analysis will aim to address. They have

Introduction

far reaching implications for the future of international criminal law and its promise to seek justice for serious violations of international humanitarian law.

CHAPTER 1

Origins of the International Criminal Law Tradition: Post-WWII

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

– Judgment of the International Military Tribunal at Nuremberg, 1946¹

Understanding the genesis of international criminal law is important for several reasons. First, it offers insights into why such a tradition became possible in the course of human history. Secondly, it demonstrates why this tradition has struggled to define its sources of law and methods of interpretation – a fundamental challenge which still troubles it today. Finally, it shows how the institutional structure in which international criminal law developed was sufficient to bring it into existence, but inadequate to provide for its ongoing normative application until subsequent historical events again made it necessary to nurture this infant tradition.

Before the Tradition Emerged

For thousands of years, customary rules have regulated the means and methods of warfare in various parts of the world. With only the rarest of exceptions, violations of such rules have been tried before national courts or military tribunals,² applying national

¹ *United States of America et al. v. Hermann Wilhelm Göring et al.*, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, Judgement: The Law of the Charter, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm>> [IMT Judgement].

² Richard May & Marieke Wierda, *International Criminal Evidence* (Ardsey, NY: Transnational Publishers, 2002) at 3 [May & Wierda, 2002]. The exception here is the trial of *von Hagenbach* in 1474 who was tried for violating that ‘laws of God and man’ by twenty-eight judges from ‘allied towns’: see

substantive, procedural and evidentiary law. The laws of war were largely seen as directed to the parties of such conflicts and, in the Westphalian system, specifically to States themselves as opposed to individuals. Gradually, individual military officials and soldiers could theoretically be held accountable for violating such laws, often due to codification in national military codes and manuals. The need to ensure discipline in professional armies offered a strong impetus for such practices, rather than the humanitarian concerns which would come to a fore during the bloody conflicts of the nineteenth century. Many generals of this era, however, like Field-Marshal-General Count von Moltke, disputed the enforceability of the rules of international humanitarian law at the international level:

Every law presupposes an authority to superintend and direct its execution, and international conventions are supported by no such authority. What neutral States would ever take up arms for the sole reason that, two Powers being at war, the 'laws of war' had been violated by one or both of the belligerents? *For offences of that sort there is no earthly judge[.]*³

Indeed, before 1945, "violations of international law and State practices during warfare were mainly dealt with by either military tribunals, which possessed limited jurisdiction, or in exceptional cases, by domestic courts."⁴

The widespread ratification of several international treaties late in the nineteenth and early twentieth centuries which codified, in part, and also further developed customary

ibid., n.4. See Jordan J. Paust, "History of International Tribunals Prior to Nuremberg: Selective History of International Tribunals and Efforts Prior to Nuremberg" (2003) 10 ILSA J. Int'l & Comp. L. 207 at 207-209.

³ Field-Marshal-General Count von Moltke in a letter to Professor J.K. Bluntschli, 11 December 1880, Holland, *Letters on War and Neutrality* (1914) at 25 cited in Sheldon Glueck, *War Criminals: Their Prosecution & Punishment* (New York: Alfred A. Knopf, 1944) at 2 [emphasis added].

⁴ Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003) at 271 [de Than & Shorts].

international humanitarian law,⁵ provided an internationally accepted normative framework that would only later be called upon, in conjunction with the peace treaties of the inter-World War period, as the substantive law foundation of an international criminal law tradition. Writing in 1944, Sheldon Glueck described this body of norms “as yet as undeveloped as was the early English common law.”⁶

While an international criminal law tradition had not yet emerged prior to 1945, it can be seen as the descendent of two conventionally distinct systems of law. Cherif Bassiouni describes international criminal law as the “convergence of the international aspects of municipal criminal law and the criminal aspects of international law. Its origin and emergence must, therefore, be traced through these two branches of law, even though it is emerging as a discipline in its own right.”⁷ According to Bassiouni, this has given international criminal law a “‘split personality’ which has plagued its development”.⁸ Some of these tensions are clear from an account of the aborted attempt to bring international criminal law into existence in the wake of the brutality of World War I.

A False Start at Leipzig

⁵ For an extensive list of such sources, from the *Resolutions of the Geneva International Conference*, Geneva, 26-29 October 1863 to *The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, see International Committee of the Red Cross, “Treaties and Documents by Date”, online: ICRC <<http://www.icrc.org>>. For adoption in national military manuals, see, e.g., *Instructions for the Government of Armies of the United States in the Field*, 24 April 1863, online: ICRC <<http://www.icrc.org>> [Lieber Code]; Prussia (Kingdom), *War Book of the German General Staff* (Mechanicsburg, PA: Stackpole Books, 2005), translated by J.H. Morgan, originally published in 1915.

⁶ Glueck, *supra* note 3 at 98.

⁷ M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code* (Germantown, NY: Sijthoff & Noordhoff, 1980) at 2 [Bassiouni, 1980].

⁸ *Ibid.* at 19.

The emergence of an international criminal law tradition got a false start after World War I. To begin with, there was sharp disagreement among the Allied powers, which hailed from a diversity of legal traditions themselves, about what law an international tribunal should apply to prosecute German officials for their conduct during the war, and whether individuals could even be prosecuted for violations of the laws of war by an international tribunal.

The *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* (Commission)⁹ recommended that an international tribunal prosecute WWI war criminals and apply “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.”¹⁰ Ironically, the Japanese delegation (then a member of the Allies) challenged the entire exercise of putting individuals who violated the laws of war on trial at all, asking “whether international law recognizes a penal law as applicable to those who are guilty.”¹¹

The Martens Clause as a Source of International Criminal Law

⁹ The Commission members were Belgium, France, Greece, Italy, Japan, Poland, Romania, Serbia, United Kingdom, United States: Paust, *supra* note 2 at 208.

¹⁰ *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, (1920) 14 Am. J. Int. L. 95 at 122 [WWI Commission] cited in Glueck, *supra* note 3 at 22.

¹¹ WWI Commission, *supra* note 10 cited in Glueck, *supra* note 3 at 23. Subsequently after WWII at the International Military Tribunal for the Far East (IMTFE) trial, only Judge Pal (India) “would have acquitted all the defendants on the ground that there had been no individual criminal responsibility under international law”: Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 20.

By referring to the ‘laws of humanity and from the dictates of public conscience’, the post-WWI Commission was indirectly attempting to incorporate the Martens Clause, named after the Russian delegate who first proposed it at the Hague Peace Conference in 1899, as an independent source of law. The Martens Clause stated:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, *from the laws of humanity and the requirements of public conscience.*¹²

Theodor Meron has described the Martens Clause as having “originated as supplementary or residual protection, based on sources of *morality and law*, pending a comprehensive codification of the laws of war.”¹³ As international humanitarian law became increasingly codified, the Martens Clause was recognized as a “powerful vehicle” for advancing humanitarian concerns, enabling the “dynamic development” of international humanitarian law, which made “clear that written humanitarian law could develop only gradually and to show *there was a common law that must be respected.*”¹⁴

However, after WWI, the U.S. rejected the Martens Clause as a source of international criminal law. While the American representative to the Commission was willing to hold individuals responsible for violations of the laws and customs of war at the international level, he issued a reservation rejecting the Martens Clause as a source of law to be applied, stating: “the laws and customs of war are a standard certain to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with

¹² Cited in Theodor Meron, “The Martens Clause, Principles of Humanity, and Dictates of Public Conscience” (2000) 94 Amer. J. Int’l L. 78 at 79 [emphasis added].

¹³ *Ibid.* at 79 [emphasis added].

¹⁴ *Ibid.* at 81, 86, 88 [emphasis added].

the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.”¹⁵ This statement reveals two paradoxical assumptions that still underlie international criminal law: the need for liberal enforcement of humanitarian norms on one hand, and the requirement of a fair trial on the other. Indeed, this early controversy surrounding the Martens Clause as a source of international criminal law has continued to the present day, such that “[g]overnments are not yet ready to transform broad principles of humanity and dictates of public conscience into binding law.”¹⁶ For example, the U.S. Department of Army has stated that the Martens Clause is “in reality a reliance upon moral law and public opinion.”¹⁷ However, as will be seen in Chapter 2, the Martens Clause has played a role in extending humanitarian protection at the modern *ad hoc* tribunals.

The significance of discarding the Martens Clause as a source of international criminal law at this point in history has had several implications for this emerging tradition. First, it has meant that the substantive body of norms in this tradition exhibited a strong tendency towards positivism. Secondly, the participants in generating norms within the tradition are largely States, as opposed to individuals or other non-State actors including non-State belligerents, non-governmental organizations, and so on. Third, since the Martens Clause embodies decidedly progressive humanitarian ideals that would have broadened the scope of substantive criminal liability, its questionable place in international criminal law signals a tendency towards the criminal law lineage within

¹⁵ WWI Commission, *supra* note 10 cited in Glueck, *supra* note 3 at 22.

¹⁶ Meron, *supra* note 12 at 88.

¹⁷ *Ibid.* at 88.

international criminal law. Finally, although formally rejected as an independent source of law, the Martens Clause continues to have some normative force, affecting beliefs about change in the international criminal law tradition by extending liability to more gradually enhance humanitarian protection. As will be discussed later in Chapter 3, similar issues have arisen with international human rights law being indirectly,¹⁸ and now directly infused in Article 21(3) of the Rome Statute of the ICC, to progressively change the international criminal law tradition, undermining positivism and State-control of this tradition.

Existing Traditions Entrenched: National Trials under National Law

When it became clear that international trials of WWI war criminals did not have the support of the German authorities, despite their obligations under the Treaty of Versailles,¹⁹ the Allies agreed to assist with domestic prosecutions by German authorities at Leipzig. In preparing these cases for trial, the United Kingdom reportedly prepared cases against accused they had named according to English standards of proof and evidence. Observing this phenomenon, commentators have stated “why the highly technical rules of evidence and standards of proof required in Anglo-American jury trials were deemed necessary in view of the fact that the accused were to be tried in German courts, under German law, and before appraisers of fact who were not laymen but trained jurists, is not clear.”²⁰ In the end, the Criminal Senate of the Reich Court of Justice at Leipzig applied the German Military Penal Code and Reich Penal Code in

¹⁸ See Richard May & Marieke Wierda, “Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha” (1999) 37 Colum. J. Transnat’l L. 725 at 732-3, 764 [May & Wierda, 1999].

¹⁹ *Treaty of Versailles*, 28 June 1919, arts. 227-8 reproduced in Paust, *supra* note 2 at 211.

²⁰ Glueck, *supra* note 3 at 31.

trying twelve accused (convicting six of them) from the original list of 896 submitted for prosecution by the Allies.²¹ These questionable prosecutions based on national law in a national court meant that the potential advent of an international criminal law tradition was delayed, if only for a brief time, until even larger-scale horrors during war would renew the call for its birth.

Nuremberg as the 'Birth Certificate' of International Criminal Law

Heiko Ahlbrecht has called the Nuremberg Charter, signed by the Allied powers in 1945 and subsequently endorsed by nineteen other States,²² the "birth certificate of international criminal law".²³ The characterization is not an exaggeration, since the Nuremberg Charter meant that "for the first time individuals were held accountable, not only for specific war infringements contrary to international humanitarian law, but also for conduct amounting to crimes against humanity. Also, for the first time precise definitions, in so far as it was possible to do so, were set out".²⁴ Indeed, after the International Military Tribunal (IMT) at Nuremberg had rendered its judgments, the U.N. General Assembly adopted Resolution 95(1) on 11 December 1946 which affirmed "the principles of international law recognized by the Charter of the Nürnberg Tribunal and

²¹ *Ibid.* at 28. Nevertheless, there was limited reference by the German court to violations "of the law of nations" in their judgments: *ibid.*, at 104.

²² In addition to Great Britain, France, the Soviet Union and the United States, the Nuremberg Charter was endorsed by Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia: Kittichaisaree, *supra* note 11 at 18.

²³ Heiko Ahlbrecht, "Foundations" in Gerhard Werle, ed., *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005) 1 at 6.

²⁴ de Than & Shorts, *supra* note 4 at 273.

the judgment of the Tribunal”.²⁵ Others have not been so gracious in their description, calling the Nuremberg proceedings “an experiment, almost an improvisation.”²⁶

However, a historical analysis of the IMT and Control Council Law No. 10²⁷ proceedings shows that the formal law set out in their constituting statutes failed to sufficiently delimit the minimally required sources of law to be relied upon. As a result, the early development of international criminal law was stunted and lacked coherence. Contrary to some academic commentary,²⁸ these post-WWII tribunals concerned themselves with more than just American criminal law, although it was very prominent. While U.S. law featured heavily and was the basis for including conspiracy as a mode of liability in the Nuremberg Charter, Soviet positions on international humanitarian law were also important in some areas, as were civilian approaches to evidentiary matters. In answering questions unaddressed in the formal law of the IMT and Control Council Law No. 10 Military Tribunals, resort was frequently had to the common law, such as articulating fundamental rights of the accused in *Farben*, discussed below. However, there are instances in which such open legal questions were resolved by considering common law and civilian systems alike (as in *Krupp* regarding trials *in absentia* of mentally incapacitated accused, discussed below), and German military law (as in *Einsatzgruppen*, discussed below). In at least one case, however, Defence Counsel was ridiculed for

²⁵ *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, GA Res. 95(I), 11 December 1946.

²⁶ Richard Overy, “The Nuremberg Trials: International Law in the Making” in Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003) 1 at 2.

²⁷ The Nuremberg system encompassed both the IMT and other subsequent Military Tribunals acting under Allied Control Council Law No. 10, which tried lesser Nazi war criminals.

²⁸ Kittichaisaree, *supra* note 11 at 44.

relying on the domestic criminal law of the Allied powers in aid of their Nazi defendants (as in *Einsatzgruppen*, discussed below).

An International Criminal Trial without an International Criminal Law

Putting Axis war criminals on trial before an international tribunal was first seriously advanced at the Allies' Moscow Conference in 1943.²⁹ Before the signing of the London Agreement and Nuremberg Charter in 1945, there was debate in the legal community as to whether and on what basis Axis war criminals could be tried by an international tribunal. Given that State responsibility is the usual means to enforce public international law, this body of law contained no obvious rules to be applied in the criminal prosecution of individuals for violations of it.

With respect to substantive law, while international humanitarian law proscribed certain means and methods of warfare, which of these should entail individual criminal responsibility? What modes of liability were possible (e.g. in addition to individual perpetration and command responsibility, what of aiding and abetting, incitement, conspiracy, complicity, etc.)? Was an inquisitorial or adversarial mode of trial to be used? What rules of procedure and evidence were to be applied given that the major legal traditions of the world varied widely? Who would be the judges or jury and in what structure of court system? How can there be an international judiciary without an

²⁹ However, as late as October 1944, British Prime Minister Winston Churchill suggested that "it should *not* be assumed that the procedure of trial will necessarily be adopted": Glueck, *supra* note 3 at 10 [emphasis added]. During the war, British Foreign Secretary, Anthony Eden, reiterated the call for summary execution of these Nazi leaders, stating: "The guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process": Overy, *supra* note 26 at 3. In the end, however, strange bedfellows of 'Soviet lawyers and American liberals', rallying around their new leader, President Harry Truman, lobbied the support needed for the Nuremberg trials to take place: *ibid.*, at 5.

international legislature? Is a less recognizable, non-formal law-making function possible? These and many more questions had no easy answers, and continue to haunt international criminal law.

Sheldon Glueck, in a wartime publication entitled *War Criminals: Their Prosecution & Punishment*, argued in 1944 that Nazi war criminals should not be tried under national law before national courts given the failure of this approach after WWI, but by an international tribunal applying “the laws and customs of legitimate warfare and of *the criminal law common to the civilized world*”.³⁰ This articulation is similar to general public international law sources, codified in 1922 by the League of Nations in Article 38(3) of the Statute of the Permanent Court of International Justice which refers to “general principles of law recognized by civilized nations”.³¹ However, as discussed in Chapters 2 and 3, the international criminal law tradition has adapted this concept, making it much more flexible, to suit its purposes and circumstances. Indeed, Glueck’s concept of ‘common criminal laws’ continues to be of lasting theoretical value to the development of international criminal law. Unfortunately, a critical analysis of the Nuremberg Charter as well as the proceedings, decisions and judgments of the IMT and Control Council Law No. 10 tribunals demonstrate that relying on common criminal laws did not generally take place.

³⁰ Glueck, *supra* note 3 at 35 [emphasis added].

³¹ Permanent Court of International Justice, *Statute of the Court*, Series D, No. 1, 13 December 1920 (Leyden: A.W. Sijthoff’s Publishing Company, 1926), art. 38(3). Subsequently, see also International Court of Justice, *Statute of the International Court of Justice* in I.C.J. Acts and Documents, No. 5: Charter, Statute and Rules of Court (1978) and other Documents, art. 38(1)(c), online: ICJ <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> [ICJ Statute].

National Influences in Formal Nuremberg Law

The IMT held that the Nuremberg Charter “is decisive, and binding upon the Tribunal”.³² As a result, it refused to seriously question the legality of various offences over which it had jurisdiction. It is significant that this tradition of treating an enabling statute as having a constitutional status has been replicated by subsequent international tribunals, such that “[e]ach international criminal tribunal interprets the law in accordance with the instrument creating the tribunal itself.”³³ With respect to the substantive law embodied in the Nuremberg and Tokyo Charters, both included modes of liability such as conspiracy “even before the concept was received, under different aspects in civilist legal systems. At that time, it was due to American influence in the framing of the statutes of the IMT and IMTFE”.³⁴ Indeed, during the preparatory work on the Nuremberg Charter, the French delegation argued against including conspiracy as a mode of liability, calling it “a barbarous concept unworthy of modern law”, and the Soviet delegation “was outright shocked at the concept of conspiracy”.³⁵

While it has been only rarely acknowledged, the Soviets also played a major role in shaping the Nuremberg Charter. Recent historical accounts suggest that Soviet positions on the emerging international criminal law tradition are still with us today, including: superior / command responsibility, hostage taking as a war crime, and the crime of

³² IMT Judgement, *supra* note 1 at Judgement: The Law of the Charter.

³³ Kittichaisaree, *supra* note 11 at 44.

³⁴ M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers Inc., 2003) at 8, n. 27 [Bassiouni, 2003].

³⁵ *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Appeals Transcript, 26 May 1997, pp. 15-17 cited in *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 7 October 1997, para. 46 [*Erdemović*, Judges McDonald and Vohrah].

waging aggressive war³⁶ (revived in Article 5(1)(d) of the Rome Statute of the ICC, but still awaiting coming into force). Formal Nuremberg law, therefore, varied in several important ways from common criminal laws as advocated by Glueck, discussed above.

Partial Judicial Articulation of Sources of Law

The Nuremberg Charter itself did not include a provision on applicable law that the IMT was to apply in its proceedings. This approach was similarly adopted in the statutes of subsequent international tribunals, with the Rome Statute of the ICC being the first to articulate applicable sources of law.³⁷ As part of the IMT judgment, a partial definition of the sources of international criminal law was enumerated. Notably, it was limited to defining only one aspect of this emerging tradition's substantive law, namely international humanitarian law. The IMT followed the post-WWI American position, discussed above, that treaty and custom constitute the substantive law being applied. While not adopting principles of humanity (i.e. the Martens Clause) as a source of law, the IMT did cautiously recognize the need for progressive development in the law:

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. *This law is not static, but by continual adaptation follows the needs of a changing world.* Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.³⁸

Law-Making Authority of International Judges: Procedural and Evidentiary Law

³⁶ John Quigley, "Soviet Influences on International Criminal Law in the Nuremberg Era" (1996) 7 *Crim. L. F.* 447 at 448-450; see also generally, George Ginsburgs, *Moscow's Road to Nuremberg: The Soviet Background to the Trial* (Boston: Martinus Nijhoff, 1996).

³⁷ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, art. 21 [ICC Statute].

³⁸ IMT Judgement, *supra* note 1 at Judgement: The Law of the Charter [emphasis added].

With respect to rules of international criminal procedure, Article 13 of the Nuremberg Charter simply stated: “The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.”³⁹ Such rules were adopted, but were quite Spartan by any standard.⁴⁰ Article 19 of the Nuremberg Charter similarly provided with respect to international criminal evidentiary law: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”⁴¹ The Tokyo Charter adopted language identical to this provision, but also added: “[...] All purported admissions or statements of the accused are admissible.”⁴² In practice, the IMT and IMTFE have been criticized because “the judges made the rules of procedure and evidence as they went along”, which resulted in “inconsistency of judicial rulings”.⁴³

Based on the vast discretionary authority on admissibility issues, the IMT was criticized for admitting hearsay and opinion evidence during its proceedings.⁴⁴ However, Richard

³⁹ *Charter of the International Military Tribunal*, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279, art. 13 [Nuremberg Charter]; see also *ibid.*, art. 24; see also *Charter of the International Military Tribunal for the Far East*, 19 January 1946, amended Apr. 26, 1946, T.I.A.S. No. 1589, art. 7, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imtfech.htm>> [Tokyo Charter]; see also *ibid.*, art. 15; see *Rules of Procedure of the International Military Tribunal for the Far East*, 25 April 1946, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imtferul.htm>>. The IMT’s Chief Prosecutors were together responsible “to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have the power to accept, with or without amendments, or to reject, the rules so recommended”: Nuremberg Charter, *ibid.*, art. 14(e).

⁴⁰ International Military Tribunal, *Rules of Procedure*, 29 October 1945, Nuremberg Trial Proceedings Vol. 1, Rules of Procedure, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm>> [IMT Rules].

⁴¹ Nuremberg Charter, *supra* note 39, art. 19.

⁴² Tokyo Charter, *supra* note 39, art. 13(a).

⁴³ May & Wierda, 2002, *supra* note 2 at xiv.

⁴⁴ de Than & Shorts, *supra* note 4 at 276.

May and Marieke Wierda have argued in favour of this approach to admissibility at Nuremberg based on the mixed nature of the trial, blending aspects of the common law and civilian traditions:

Although the trials were adversarial and the parties alone were responsible for calling the evidence, the judges were sitting without a jury, and the common law rules designed to prevent jurors from hearing prejudicial evidence were discarded in favour of a liberal approach akin to that of civil law systems.⁴⁵

Another example of the blending of traditions occurred among the Nuremberg Prosecutors, hailing from both common and civilian traditions, over the requirements of the charging documents.⁴⁶

As a result of these provisions, the Nuremberg approach of vesting institutional authority in international judges to make procedural and evidentiary law was followed in subsequent international tribunals,⁴⁷ which similarly lacked an external legislative body that could enact and amend such rules. The variation being that the modern *ad hoc* tribunals enacted detailed Rules of Procedure and Evidence to apply beforehand, which

⁴⁵ May & Wierda, 1999, *supra* note 18 at 729.

⁴⁶ Johnathan A. Bush, "Lex Americana: Constitutional Due Process and the Nuremberg Defendants" (2001) 45 St. Louis L. J. 515 at 524.

⁴⁷ See *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/827 (1993), art. 15 [ICTY Statute]: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighboring States*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., Annex, U.N. doc S/955 (1994), art. 14 [ICTR Statute]: "The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary."

have been frequently reviewed and amended.⁴⁸ It has been observed that this approach “gave the judges of the[se ...] tribunals a quasi-legislative power, which was, for all practical purposes, *unmatched in the world’s major legal systems* where distinctions between legislative and judicial powers are carefully observed.”⁴⁹ As will be discussed, however, judges of the ICC have very limited formal law-making authority with respect to rules of procedure and evidence, with primary legislative authority being vested in the Assembly of States Parties.⁵⁰

Answering Unanswered Questions

A natural consequence of the Nuremberg Charter’s failure to define applicable sources of law, the allowance for judge-made procedural and evidentiary law, and the nascent state of international criminal law at the time, was that questions would inevitably arise for which there were no clear answers. The result was that rules and concepts were borrowed and imported from national legal traditions. However, “[e]xperiences in national legal systems are not easily transferable to international legal institutions. More particularly, they cannot easily be merged with other national experiences”.⁵¹

It may be for these reasons that the IMT hid the normative basis of some of its important decisions, such that the independent sources of the international criminal law tradition

⁴⁸ See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Rules of Procedure and Evidence*, U.N. Doc. IT/32 (1994), as amended [ICTY Rules]; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/Rev.1 (1995), as amended [ICTR Rules].

⁴⁹ May & Wierda, 2002, *supra* note 2 at xiv [emphasis added].

⁵⁰ *Ibid.* at 20.

⁵¹ *Ibid.* at xv.

were concealed. This may be seen in a pre-trial decision on trials *in absentia* of mentally incapacitated accused, and in the IMT's final judgment regarding the definition of conspiracy.

Defence Counsel for the Defendant Krupp von Bohlen argued before the IMT that the accused, who was suffering from serious mental illness, should not be tried *in absentia*.⁵²

Defence Counsel relied on the civilian legal tradition in support of this argument:

[...] the procedure in absentia against Krupp, would be contrary to justice, not only according to the provisions of the Charter but also according to the generally recognized principles of the law of procedure of civilized states.

So far as I am informed, *no law of procedure of a continental state permits a court procedure against somebody who is absent, mentally deranged, and completely incapable of arguing his case.* According to the German Law of Procedure, the trial must be postponed in such a case (Paragraph 205 of the German Code of Criminal Law). If prohibiting the trial of a defendant, who is incapable of being tried, is a generally recognized principle of procedure (*principe général de droit reconnu par des nations civilisées*) in the sense of Paragraph 38 (c) of the Statute of the International Court in The Hague, then a tribunal upon which the attention of the whole world is, and the attention of future generations will be directed, cannot ignore this prohibition.⁵³

In response, Mr. Justice Robert Jackson, Chief of Counsel for the United States conceded that "a man in the physical and mental condition of Krupp could not be tried" under American law or under the law of "most of the jurisdictions".⁵⁴ Sir Hartley Shawcross, Chief Prosecutor of the United Kingdom, also admitted that under English criminal law, such a trial could not take place.⁵⁵ Nevertheless, Justice Jackson argued that the IMT should try the accused and ignore common criminal laws of the world:

⁵² *United States of America et al. v. Hermann Wilhelm Göring et al.*, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg Trial Proceedings Vol. 2, Preliminary Hearing, 14 November 1945 at 1, online: Avalon Project <<http://www.mazal.org/archive/imt/02/Imt02-T001.htm>> [IMT Preliminary Hearing].

⁵³ *Ibid.* at 3 [emphasis added].

⁵⁴ *Ibid.* at 9.

⁵⁵ *Ibid.* at 12.

Of course, trial in absentia has great disadvantages. *It would not comply with the constitutional standard for citizens of the United States in prosecutions conducted in our country.* It presents grave difficulties to counsel under the circumstances of this case. Yet, in framing the Charter, we had to take into account that all manner of avoidances of trial would be in the interests of the defendants, and therefore, the Charter authorized trial in absentia when in the interests of justice, leaving this broad generality as the only guide to the Court's discretion.⁵⁶

Without explicitly stating the basis for its decision, the IMT decided in a brief one-page order to grant the postponement of the proceedings against the Defendant Krupp – effectively refusing to try him.⁵⁷ Given the confidential nature of the IMT's judicial deliberations, it is equally possible that the trial of this accused was prevented on account of the IMT's independent assessment of the 'interests of justice', or its decision to follow the approach directed by common criminal laws of the world. The fact that it is impossible to know the basis of the decision, or how it was made, prevented it from transmitting information about the inner workings of the international criminal law tradition.

Similarly, in considering the elements of conspiracy, which was not defined in the Nuremberg Charter, the IMT judgment outlined a definition of this mode of responsibility without invoking *any* authorities whatsoever:

Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty five points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and

⁵⁶ *Ibid.* at 5 [emphasis added].

⁵⁷ *United States of America et al. v. Gustav Krupp von Bohlen et al.*, Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp von Bohlen, 15 November 1945, online: Avalon Project <<http://www.mazal.org/archive/imt/01/IMT01-T143.htm>> [IMT, *Krupp Decision*]. It should be noted that another accused, Martin Bormann, Head of the Nazi Party Chancellery was tried *in absentia* and sentenced to death: Kittichaisaree, *supra* note 11 at 18.

determine the participants in that concrete plan. It is not necessary to decide whether a single master conspiracy between the defendants has been established by the evidence.⁵⁸

Again, these opaque reasons have hampered the development of international criminal law because they offer no guidance or methodology as to how an international tribunal may go about identifying norms and elaborating rules which are not already explicitly set out in formal sources of law.

Affects on other Traditions

The birth of international criminal law at Nuremberg also had external effects in, and across, other legal traditions. In particular, the substantive and procedural innovations of the Nuremberg process spurred developments in national human rights law,⁵⁹ and contributed to the advent of regional human rights law and bodies such as the European Court of Human Rights.⁶⁰ At the same time, there was a flurry of activity in international humanitarian law, leading to the 1949 Geneva Conventions. Nuremberg promised to give this previously meager body of law some real teeth, and this was recognized by the inclusion of the ‘grave breaches’ provisions in international humanitarian law treaties, which have been interpreted to codify individual criminal responsibility.⁶¹

⁵⁸ IMT Judgement, *supra* note 1 at Judgement: The Law as to the Common Plan or Conspiracy.

⁵⁹ Ellen Ash Peters, “Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg: The Capacity of Judicial Institutions to Play an Affirmative Role in the International Protection of Human Rights: Implications for and from Domestic Law” (1997) 12 Conn. J. Int’l L. 219 at 222-3.

⁶⁰ Mark W. Janis, “Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg – The Utility of International Criminal Courts” (1997) 12 Conn. J. Int’l L. 161 at 168.

⁶¹ See *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, 12 August 1949, art. 50 [GC I]; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, 12 August 1949, art. 51 [GC II]; *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, 12 August 1949, art. 130 [GC III]; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, art. 147 [GC IV], all online: ICRC <<http://www.icrc.org>>.

Two Steps Forward, One Step Back: Control Council Law No. 10

The possibility of an international criminal law tradition emerging from the post-WWII era would have been substantially diminished were it not for the creation of military tribunals under Control Council Law No. 10 which tried lesser Nazi war criminals on the basis of the precedent of the IMT judgment, giving it immediate relevance and refinement. Confusion is apparent in the case law of these military tribunals as to whether they were international tribunals applying international law or not. In one case, a Control Council Law No. 10 tribunal explicitly identified itself as an international tribunal which administered international law – a position confirmed by the U.S. Court of Appeals for the District of Columbia which held that the tribunal’s “powers and jurisdiction arose out of the joint sovereignty of the Four victorious powers”.⁶² However, in another case, a Control Council Law No. 10 tribunal took the view that “this is an American court of Justice, applying the ancient and fundamental concepts of Anglo-Saxon jurisprudence”.⁶³ For its part, Control Council Law No. 10 explicitly sought to establish a degree of uniformity in the norms applied in prosecuting war criminals in Germany after WWII, suggesting that these tribunals were not to simply apply the respective national laws of the victorious powers in their zones of occupation:

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish *a uniform legal basis in Germany for the prosecution of war criminals*

⁶² *Flick v. Johnson*, 174 F.2d. 983, 984-986; cert. den. 338 U.S. 879 (1949) and Trial of Frederick Flick and Five Others (‘Flick’ case), Trials of War Criminals, vol. VI, p. 1188 cited in *Erdemović*, Judges McDonald and Vohrah, *supra* note 35, para. 53.

⁶³ Trial of Erhard Milch (‘Milch’ case), Trials of War Criminals, vol. II, p. 778 cited in *Erdemović*, Judges McDonald and Vohrah, *supra* note 35, para. 53.

*and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows: [...]*⁶⁴

However, the degree to which uniformity of the legal basis for prosecutions under Control Council Law No. 10 took place in practice in the Allied Zones varied widely. The best examples of “systematic and mutually harmonious” implementation of the law reportedly took place in the U.S. and French zones, while the British zone relied on a Royal Warrant⁶⁵ for their trials, and the Soviets failed to conduct trials pursuant to the Control Council Law No. 10 at all.⁶⁶

Past International Criminal Law Decisions as Precedent

The common law concept of precedent was quickly adopted by the Control Council Law No. 10 military tribunals as they frequently relied on the IMT judgment. For example, the Military Tribunal in *Farben*, acting under Control Council Law No. 10, held that the IMT judgment was “basic and persuasive precedent”.⁶⁷ This carefully chosen language of ‘persuasive precedent’ is significant in that these tribunals did not consider themselves to be strictly bound through *stare decisis* to the IMT judgment.

Relationship with other Legal Traditions in Words and Action

⁶⁴ *Law No. 10 of the Control Council for Germany*, Official Gazette of the Control Council for Germany, preamble, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/imt10.htm>> [Control Council Law No. 10; emphasis added].

⁶⁵ *Royal Warrant – Regulation for the Trial of War Criminals* (U.K.), 0160/2498, A.O. 81/1945, 18 June 1945, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm>>.

⁶⁶ Daryl A. Mundis, “Completing the Mandates of the *Ad Hoc* International Criminal Tribunals: Lessons from the Nuremberg Process” (2005) 28 *Fordham Int’l L. J.* 591 at 599-560.

⁶⁷ *United States of America v. Carl Krauch et al.* (*Farben Case*), Case No. 6, Military Tribunal VI in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. VIII (United States: Government Printing Office, 1953) at 1098, online: Avalon Project <<http://www.mazal.org/archive/nmt/04/NMT04-T0001.htm>> [*Farben*].

A critical reading of the Control Council Law No. 10 proceedings reveals a more transparent approach than the IMT decisions on so-called unanswered questions. These subsequent military tribunals also articulated a more coherent relationship between existing legal traditions (principally the common law / Anglo-American, and civilian / Continental systems) and the emerging international criminal law tradition.

A significant holding in the *Hostages Case* provided that “if a principle is found to have been accepted generally as a fundamental rule of justice by *most nations* in their municipal law, its declaration as a rule of international law would seem to be fully justified.”⁶⁸ National rules of criminal law become applicable at the international level on this view only when there is sufficient accord among them. As discussed later, once transposed, these rules may take on an independent existence at the international level. Subsequently, they may flow back into national legal traditions and influence them, with the cycle repeating itself over time. In Chapter 3, the ICC’s complementarity regime will be considered in light of this observation.

However, despite this theoretical approach as described in the *Hostages Case*, an analysis of the Control Council Law No. 10 proceedings demonstrates that these judges only narrowly considered national laws, or simply applied their own national laws.⁶⁹ In *Farben*, American criminal law was heavily relied upon by the Military Tribunal in resolving issues unaddressed by its formal law, despite Defence Counsel’s “controversy

⁶⁸ As interpreted by the ICTY Appeals Chamber in *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22, Appeals Chamber, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 25 [*Erdemović*, Judge Stephen; emphasis added].

⁶⁹ Kittichaisaree, *supra* note 11 at 44.

whether the rules governing this case should be derived from the German penal law or from a judicial system based either on the continental law of Europe or on the all embracing international law".⁷⁰ The Military Tribunal cited the IMT judgment on the law regarding conspiracy, and developed it further by invoking case law of the United States Supreme Court.⁷¹ It also expressly invoked fundamental principles of 'Anglo-American criminal law' regarding the rights of the accused:

In weighing the evidence and in determining the ultimate facts of guilt or innocence with respect to each defendant, *we have sought to apply these fundamental principles of Anglo-American criminal law:*

1. There can be no conviction without proof of personal guilt.
2. Guilt must be proved beyond a reasonable doubt.
3. Each defendant is presumed to be innocent, and that presumption abides with him throughout the trial.
4. The burden of proof is, at all times, upon the prosecution.
5. If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must prevail.⁷²

Whether these principles were in fact part of a broader transnational common criminal law was not considered by the Military Tribunal – they were only grounded in the common law tradition.

However, in the *Einsatzgruppen Case*, in confirming that individuals may be responsible for certain violations of international law, the Military Tribunal cited the Hague and Geneva Conventions, as well as the *Recht der Landkriegsfuehrung* (German Military

⁷⁰ *Farben*, *supra* note 67 at 954.

⁷¹ See *ibid.* at 1127.

⁷² *Ibid.* at 1108.

Manual) and a collection on German Military Law.⁷³ This willingness to incorporate national legal traditions did not extend to the communist legal order in this case. Defence Counsel had argued that Soviet criminal law afforded a defence of ‘self-defence on behalf of a third party’, and sought to invoke the doctrine. The Military Tribunal responded in a cynical and revealing passage of its decision, rejecting the possibility:

In developing this theme of defense for Germany, Dr. Aschenauer insisted that this Tribunal apply his interpretation of Soviet law. One cannot avoid noting the paradox of the defendant's invoking the law of a country whose jurisprudence, ideologies, government and social system were all declared antagonistic to Germany, and which very laws, ideologies, government, and social system the defendants, with the rest of the German Armed Forces, had set out to destroy. However, it is the prerogative of defense counsel to advance any argument which he deems appropriate in behalf of his client and the fact that Dr. Aschenauer considers Soviet law more modern than German law cannot fail to be interesting.⁷⁴

The Military Tribunal ultimately rejected this Soviet criminal law defence, indicating that it did not correspond “with any acceptable tenets of international law”.⁷⁵ The generalized nature of the rejection seems suspect, given that other Military Tribunals had no difficulty applying or questioning national law from a single jurisdiction, principally the U.S., with which they were more familiar and from which they hailed.

From these cases, it appears that theoretical insistence on deriving general principles of law from national legal systems was not followed up in practice with any real comparative analysis by the post-WWII tribunals. This internal contradiction in the early practice of the international criminal law has persisted, albeit to a lesser extent, at the modern *ad hoc* tribunals, as discussed in the next chapter.

⁷³ *United States of America v. Otto Ohlendorf et al.* (Einsatzgruppen Case), Case No. 9, Military Tribunal II-A in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. IV at 460-1, online: Avalon Project <<http://www.mazal.org/archive/nmt/04/NMT04-T0460.htm>> [Einsatzgruppen].

⁷⁴ *Ibid.* at 462-3.

⁷⁵ *Ibid.* at 464.

Implications of Early Institutions of International Criminal Law

International criminal law emerged in an institutional ‘vacuum’.⁷⁶ While a Permanent International Court of Justice had been in existence for over two decades under the auspices of the League of Nations, it was limited to disputes between States and concerned itself with questions of public international law. Entirely new institutions had to be created to try individuals for international crimes before international judges.

These early institutions of international criminal law came into existence alongside the prosecution of war criminals before national courts after WWII.⁷⁷ A defining feature of the international criminal law tradition is, therefore, its competitive (or ‘complementary’) relationship with national jurisdictions and their distinct legal systems. Without a space in which to develop and proliferate after WWII until the end of the Cold War, an international criminal law tradition could not truly emerge. Like any tradition, it required room in which to develop and grow. The modern *ad hoc* tribunals, discussed in Chapter 2, were able to make so much headway in developing the tradition largely owing to their powerful jurisdictional primacy and comparatively vast infrastructure.⁷⁸

⁷⁶ May & Wierda, 2002, *supra* note 2 at xiv.

⁷⁷ See *London Agreement of August 8th 1945*, Nuremberg Trial Proceedings Vol. 1, arts. 4, 6, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>> [emphasis added].

⁷⁸ See *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at paras. 56, 58 (requesting Germany defer to the ICTY) [*Tadić*, Appeals Decision on Jurisdiction]; *In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić and Mićo Stanišić*, Case No. IT-95-5-D, Trial Chamber, Decision on the Bosnian Serb Leadership Deferral Proposal, 16 May 1995 at paras. 2, 5, 26 (requesting Bosnia and Herzegovina defer to the ICTY); see also Madeline Harris, “The Trials of Concurrent Jurisdiction: The Case of Rwanda” in M. Cherif Bassiouni, ed., *International Criminal Law*, Vol. III, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999) at 576-7 (requesting Rwanda and Belgium defer to the ICTR) [Bassiouni, 1999].

Another defining institutional aspect of the early institutions of international criminal law, as well as the modern *ad hoc* tribunals, is their symbiotic relationship with political considerations. These institutions, much like their successors, were created in response to atrocious events in war, such that “these institutions have been shaped by political leaders and diplomats rather than by jurists with experience in international and comparative criminal law and procedure.”⁷⁹ Antonio Cassese has acknowledged that international criminal law and international politics “are forever intertwined [...] We are aware that so long as international political demands are at odds with interests of justice, justice might have to capitulate. But we are making huge effort to avoid such a capitulation.”⁸⁰ While the ICC as a permanent institution is relatively more insulated from specific political motivations, the process of drafting the Rome Statute was a mixed exercise of diplomats with comparative and international lawyers, and representatives of civil society (i.e. non-State actors).

Loosely interlocking institutions was another important early feature of international criminal law institutions. The IMT judgment and infrastructure was largely made available for the subsequent Control Council Law No. 10 cases, significantly facilitating their achievements.⁸¹ As discussed, Control Council Law No. 10’s call for uniform application of law meant that at least some degree of consistency resulted. However,

⁷⁹ May & Wierda, 2002, *supra* note 2 at xiii.

⁸⁰ Antonio Cassese, “Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg: Remarks Given at the Old State House” (1997) 12 Conn. J. Int’l L. 201 at 207-8.

⁸¹ Mundis, *supra* note 66 at 613. The IMT judgement was also a very important precedent for the IMTFE: Kittichaisaree, *supra* note 11 at 19.

since there was no appellate procedure, it was not entirely possible to ensure coherent application of law across the various Military Tribunals deciding cases under the authority of Control Council Law No. 10, despite aspirations to do so. The lifespan of these post-WWII tribunals was also quite limited, such that all trials were complete within several years, and decision-makers were restricted to the nationalities of the Allied judges. These institutional realities combined with the virtual absence of war crimes prosecutions until the creation of the ICTY after the end of the Cold War⁸² meant that international criminal law was a relatively primitive and impoverished body of law at this stage.

Conclusion

Without the advent of the modern *ad hoc* tribunals, it would have been impossible to call the post-WWII tribunals the birthplace of an international criminal law tradition – they would have simply been a historical moment, and nothing more. Continuity was only achieved as the modern *ad hoc* tribunals looked back and drew, sometimes heavily, upon the post-WWII tribunals to claim their legitimacy, gained over time, and in so doing also inherited many of the same underlying assumptions, challenges and controversies of these legacy tribunals.

A critical analysis of the origins of the emerging international criminal law tradition has provided important insights into its fundamental core. First and foremost, it is a hybrid tradition which seeks legitimacy and answers to difficult questions by drawing on other

⁸² Roelof Haveman *et al.*, eds., *Supranational Criminal Law: A System Sui Generis* (Antwerp: Intersentia, 2003) at 1.

established legal traditions. In practice, it has struggled to do so effectively for institutional reasons as well as obvious difficulties in attempting to reconcile vastly different national legal systems. Secondly, its aims appear to be frequently at odds: enhancing humanitarian protection, on one hand, and protecting the rights of the accused on the other. Third, its institutional structure has traditionally vested significant law-making power in the hands of international judges. The nagging question as to whether the unresolved tensions in the international criminal law tradition are systematic and intrinsic only grows as the experience of the modern *ad hoc* tribunals is critically evaluated.

C H A P T E R 2

Development of the International Criminal Law Tradition: ICTY/R

The development of international criminal law through over a decade of jurisprudence at the ICTY and ICTR has confirmed many of the features of this emergent tradition as discussed in Chapter 1, and made it possible to focus sharply on fundamental questions about its sources and institutions. The hybrid nature of international criminal law makes it impossible to confine its sources to simple reiterations of the sources of public international law, despite repeated attempts to do so. The intractable tensions already identified in the origins of this tradition, between extending humanitarian protection and ensuring fairness to the accused, have only intensified and continue to be at the crux of hard cases which have come before the modern *ad hoc* tribunals. Renewed interest in the Martens Clause, discussed in Chapter 1, and a proliferation in codification of international humanitarian law in 1949 and 1977 has added new normative force to extending humanitarian protection. On the other hand, international human rights law has similarly experienced massive growth and codification since the post-WWII tribunals, meaning that an accused in any criminal proceeding is entitled to a broader range of specific rights, and more generally, to guarantees of a fair trial.

In several noteworthy instances, the modern *ad hoc* tribunals have explicitly resolved lacunae in international criminal law based on favouring extending humanitarian protection over ensuring fairness to the accused, and vice versa. In other cases, national laws, as part of grander common law and civilian legal traditions, have served a 'gap

filling' function. It is argued that these transnational common laws have not simply been aggregated to establish rules of customary international law or general principles of law, but have been drawn upon at the discretion of these international judges as persuasive, non-binding authority. This controversial view is particularly significant given that Article 21 of the Rome Statute explicitly contemplates that "national laws will provide a 'fall-back' resource similar to that in the current [*ad hoc*] tribunals".⁸³

Struggling to Refine Sources of Law and Interpretive Doctrines

The Statutes of the modern *ad hoc* tribunals were handed down by the U.N. Security Council, offering a definitive constitutional document to be applied, serving the same function as the Nuremberg and Tokyo Charters. Similar to the post-WWII tribunals, these modern judges were empowered to enact Rules of Procedure and Evidence, but this time amended them substantially over time based on experience gained during successive proceedings, and based on "general principles underlying the major legal systems of the world".⁸⁴

While the Statutes of the modern *ad hoc* tribunals are more detailed than the Nuremberg and Tokyo Charters, they similarly do not include an explicit definition of applicable law.⁸⁵ Some observers consider that this has been the practice owing to 'political considerations', namely that it would be difficult to obtain prompt agreement among

⁸³ May & Wierda, 2002, *supra* note 2 at 102.

⁸⁴ May & Wierda, 1999, *supra* note 18 at 735.

⁸⁵ They did, however, authorize the application of various international treaties, including grave breaches of the 1949 Geneva Conventions, and, additionally in the case of the ICTR, serious violations of Additional Protocol II of 1977: see ICTY Statute, *supra* note 47, art. 2; ICTR Statute, *supra* note 47, art. 4.

States on what law(s) should be applicable.⁸⁶ Cherif Bassiouni has charged that matters that were unaddressed in the legacy and modern *ad hoc* tribunal statutes “have been dealt with on an *ad hoc* and sometimes an improvised manner”.⁸⁷ Unlike the IMT and IMTFE which only consisted of one mega-trial each, however, the modern *ad hoc* tribunals were created to prosecute dozens of separate cases. When faced with questions which were not resolved in their Statutes or Rules of Procedure and Evidence, the judges of these modern *ad hoc* tribunals felt it necessary to articulate a *de facto* definition of applicable law to lend legitimacy to their adjudication and provide a degree of theoretical coherence to the emerging international criminal law tradition. In so doing, these judges went beyond the rudimentary judicial definition of applicable law offered in the IMT judgment, discussed in Chapter 1, which referred only to sources of international humanitarian law – one part of the substantive law of international criminal law.

Public international law, international humanitarian law, international human rights law, and national criminal laws are streams which feed international criminal law. Given that there was no international criminal code in the mid-1990s when the *ad hoc* tribunals were created, national legal traditions varied in their identification of sources of criminal laws, and international humanitarian law offered no guidance on how to conduct a criminal trial, resort to general public international law was thought to be a logical place to find broadly defined sources of international criminal law. Specifically, judges of the modern *ad hoc* tribunals adopted Article 38(1) of the *Statute of the International Court of Justice*

⁸⁶ Bassiouni, 2003, *supra* note 34 at 267.

⁸⁷ *Ibid.*, at 263.

(ICJ Statute)⁸⁸ as their own to provide a normative super-structure to define applicable sources of international criminal law.⁸⁹ Commentators have explicitly indicated the need, however, for these sources of law to be “subject to the principles of legality which derive from general principles of law”.⁹⁰ Likewise, in interpreting their Statutes, the modern *ad hoc* tribunals have imported Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*⁹¹ to define the interpretive canons of international criminal law,⁹² despite the fact that the Statutes of these tribunals were created under U.N. Security Council resolutions and are not, strictly speaking, international treaties.

⁸⁸ Reproduced in Appendix: ICJ Statute, *supra* note 31, art. 38(1).

⁸⁹ See, e.g., for ICTY: *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeals Chamber, Declaration of Judge Patrick Robinson, 21 July 2000, p. 94 at n. 10 [*Furundžija*, Judge Robinson]; *Erdemović*, Judges McDonald and Vohrah, *supra* note 35, para. 40; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Declaration of Judge David Hunt, 24 March 2000, n. 1 [*Aleksovski*, Judge Hunt]; see also, e.g., for ICTR: *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Appeals Chamber, Separate Opinion of Judge Shahabuddeen, 31 May 2000, n. 20; *Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Appeals Chamber, Decision (Prosecutor’s Request for Review of Reconsideration), 31 March 2000, para. 20.

⁹⁰ Bassiouni, 2003, *supra* note 34 at 4.

⁹¹ Reproduced in Appendix: *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, arts. 31-32.

⁹² See, e.g., for ICTY: *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 63 (“the Trial Chamber is bound to interpret the Statute in accordance with Article 31 of the Vienna Convention on the Law of Treaties”); *Prosecutor v. Dusko Tadić et al.*, Case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999, para. 300 [*Tadić*, Appeals Judgement]; *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9, Trial Chamber, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000, para. 47; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Trial Chamber, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004, para. 31 (“From the earliest days of the work of the International Tribunal, it was decided that the Statute is to be interpreted as a treaty.”); see also, e.g., for ICTR: *Prosecutor v. Théoneste Bagosora and 28 Others*, Case No. ICTR-98-37-A, Appeals Chamber, Decision on the Admissibility of the Prosecutor’s Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 8 June 1998, para. 28 (“The Appeals Chamber agrees with the Prosecutor on the applicability, *mutatis mutandis*, of the Vienna Convention on the Law of Treaties to the Statute.”) [*Bagosora*, Appeals Decision]; *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-A, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, 3 June 1999, para. 11 (“[...] the rules of the Vienna Convention, and Article 31 in particular, reflect customary rules of interpretation which originate from principles found in systems of municipal law [...]”).

The implications of the modern *ad hoc* tribunals incorporating these public international law concepts into international criminal law have been largely ignored. Without a doubt, however, the case law of these tribunals demonstrates difficulties in importing these general public international law doctrines, designed to deal with legal disputes between States “based on a consensual relationship between co-equal sovereigns”,⁹³ into international criminal law, which is designed to prosecute individuals. It also presents, in concrete terms, analogous problems to those which will realistically arise under Article 21 of the Rome Statute. Even where sources of law are provided for, there will be lacunae which must be identified and understood, preferably before they appear in practice.

Sources of Law

With respect to sources of law, most of the difficulties arise with respect to Article 38(1)(c) of the ICJ Statute which refers to “general principles of law recognized by civilized nations”.⁹⁴ In their Joint and Separate Opinion in *Erdemović*, Judge McDonald and Judge Vohrah of the ICTY Appeals Chamber stated that “one purpose of this article is to avoid a situation of non-liquet, that is, where an international tribunal is stranded by an absence of applicable legal rules”.⁹⁵ In actually deriving these general principles, the approach adopted by these judges was described by them as follows:

it is generally accepted that the distillation of a ‘general principle of law recognised by civilised nations’ does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute [...] In light of these considerations, our approach

⁹³ Bassiouni, 2003, *supra* note 34 at 11.

⁹⁴ ICJ Statute, *supra* note 31, art. 38(1)(c).

⁹⁵ *Erdemović*, Judges McDonald and Vohrah, *supra* note 35, para. 57.

will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.⁹⁶

There are, however, several problems with the approach described by Judge McDonald and Judge Vohrah, despite its obvious pragmatic justification. First, there is no answer provided for how extensive a survey of national legal systems is required. In the same case, Judge Stephen held that “no universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled; it is enough that the prevailing number of nations within each of the *main families of laws* recognize such a principle.”⁹⁷ By ‘families of laws’, it is highly probable that Judge Stephen is referring to legal traditions. The legal traditions that the modern *ad hoc* tribunals have drawn upon and validated in practice are considered later in this Chapter, but it may be noted here that they are limited to Western legal traditions (i.e. common and civil law) in all but the rarest cases.

Secondly, jurisdictions which are accessible ‘as a practical matter’ clearly imports institutional considerations into the equation which have undoubtedly affected the development of international criminal law. This tradition is not alone in this phenomenon, however. Historically, law travels only where it is known and in a language that is understood by its adherents.⁹⁸ Recalling the earlier discussion of the relationship between the staffing of the IMT on the national laws that it considered from

⁹⁶ *Ibid.*, para. 57.

⁹⁷ Erdemović, Judge Stephen, *supra* note 68, para. 25 [emphasis added].

⁹⁸ H. Patrick Glenn, *On Common Laws* (Oxford: Oxford University Press, 2005) at 62 [Glenn, *On Common Laws*].

Chapter 1, it appears that Judge McDonald and Judge Vohrah have accepted this practice as legitimate at the modern *ad hoc* tribunals, which are required to staff their positions based on more diverse geographic representation.

Third, there may be a degree of incommensurability between the legal families or traditions that the modern *ad hoc* tribunals have turned their mind towards. There are significant theoretical and practical limitations in resorting to national laws, which are situated in vastly different legal systems, to resolve isolated and narrow questions for international criminal law. In *Simić*, Judge Hunt recognized this problem in the context of international rules of evidence:

It is not easy to discover general principles of law in relation to this issue which are recognised by the domestic laws of (all) civilised nations. This is because most civil law systems have detailed statutory provisions in relation to evidence which is the subject of claims of confidentiality, whereas most common law systems leave it to the courts to determine where the balance lies between competing public interests. It is therefore necessary, in my view, to commence from first principles.⁹⁹

However, in *Delalić*, the ICTY Trial Chamber took a different approach, approving of a highly discretionary power of the judges to fill gaps in the Rules of Procedure and Evidence by making eclectic use of national laws of their choice:

Whilst not being bound by national rules of evidence, it seems to the Trial Chamber that the Chambers can, where appropriate, be guided by such national rules. Hence, *the Chambers may in their discretion apply rules of evidence which will best favour the determination of the matter before them*. In any case, such laws must be consistent with the spirit of the Statute and general principles of law.¹⁰⁰

This approach is more generally codified in Rule 89(B) of the Rules of Procedure and Evidence of both of the modern *ad hoc* tribunals, enacted by the judges of these tribunals:

⁹⁹ *Prosecutor v. Bladoje Simić et al.*, Ex Parte and Confidential Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999, para. 24 (WL).

¹⁰⁰ *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion to Allow Witness K, L, and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, para. 7.

In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will *best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.*¹⁰¹

These statements differ sharply from a faithful application of Article 38(1) of the ICJ Statute, thus reinforcing the origins of international criminal law being driven by judicial discretion, given its long-standing absence of an external institutional framework to enact, amend and repeal the law that is applied.¹⁰² To develop this point further, it is helpful to introduce a legal theory which offers an alternative explanatory perspective on how law is being selected and applied by the modern *ad hoc* tribunals in difficult cases where there are lacunae in formal sources.

Patrick Glenn's theory of transnational common laws offers some promising insights when applied to the international criminal law tradition. Transnational common laws have "no obligatory or mandatory content", yield to particular laws (meaning that they largely fulfill a 'gap filling' function), and depend on "persuasion and collaboration, amongst jurists, amongst judges."¹⁰³ While Glenn's theory has been "hampered by the idea that the source of all law is the nation-state",¹⁰⁴ it has the potential for greater purchase in this emergent international tradition, which is not restrained by the exclusivity of the domestic law of any given State. The above statements interpreting the applicable law at the modern *ad hoc* tribunals comes very close to applying these

¹⁰¹ ICTY Rules, *supra* note 48, r. 89(B); ICTR Rules, *supra* note 48, r. 89(B).

¹⁰² In this regard, the creation of the Assembly of States Parties for the ICC is a major institutional development which will be considered in detail in Chapter 3.

¹⁰³ Glenn, *On Common Laws*, *supra* note 98 at 62, 45.

¹⁰⁴ H. Patrick Glenn, "Transnational Common Laws" at 1 (undated) [Glenn; "Transnational Common Laws"; on file with author].

transnational common laws, which operate in the background and appear when hard cases present themselves.¹⁰⁵ Further evidence of this having taken place in practice is considered later in this Chapter – also demonstrating that ‘transnational judicial dialogue’¹⁰⁶ is part of the international criminal law tradition in order to transmit information. Indeed, the concept of ‘general principles of law’ has been seen in other contexts to provide a ‘liaison’ between national laws.¹⁰⁷ Similarly, Michèle Buteau and Gabriël Oosthuizen have sought to demonstrate that substantive and procedural lacunae in the Statutes of the modern *ad hoc* tribunals are filled by resorting to the inherent, implied, or incidental powers of the judges to resolve such matters.¹⁰⁸ At this stage of development of the international criminal law tradition, the final component of Glenn’s transnational common laws theory – “the recognition of different groups of people to whom different laws could be applied”¹⁰⁹ – has yet to fully materialize, but has the potential to do so at the ICC based on Article 21(1)(c) of the Rome Statute, discussed further in Chapter 3.¹¹⁰

This hypothesis that judges at the modern *ad hoc* tribunals fill lacunae in international criminal law in a manner consistent Glenn’s transnational common laws theory, as

¹⁰⁵ Glenn, *On Common Laws*, *supra* note 98 at 20.

¹⁰⁶ Glenn, “Transnational Common Laws”, *supra* note 104 at 12, 17.

¹⁰⁷ Glenn, *On Common Laws*, *supra* note 98 at 49, n. 19.

¹⁰⁸ Michèle Buteau & Gabriël Oosthuizen, “When the Statute and the Rules are Silent: The Inherent Powers of the Tribunal” in Richard May *et al.*, eds., *Essays on ICTY Procedure and Evidence* (The Hague: Kluwer Law International, 2001) 65 at 80

¹⁰⁹ Glenn, *On Common Laws*, *supra* note 98 at 63. Glenn refers to the theory as relational common laws as well.

¹¹⁰ As will be discussed in Chapter 3, this element has been brought in through the operation of Article 21(1)(c) of the Rome Statute which directs the ICC to apply, “[...] as appropriate, the national laws of States that would normally exercise jurisdiction over the crime [...]”: ICC Statute, *supra* note 37, art. 21(1)(c).

opposed to adherence to Article 38(1) of the ICJ Statute, is likely to be controversial.¹¹¹ The aim at this stage, however, is not to provide a normative theory but a descriptive one. Glenn's theory is very different from engaging in a detailed comparative analysis of state practice and evidence of *opinio juris* for the purpose of declaring a *rule* of customary international law or finding a general principle of law, within the meaning of Article 38(1)(b),(c) of the ICJ Statute. This distinction was implicitly recognized in *Furundžija* by Judge Robinson who began by noting that "[i]t is perfectly proper, therefore, to examine national decisions on a particular question in order to ascertain the existence of international custom",¹¹² but then back-tracked to deny that any such use of national laws was being made in the judgment:

Although the Judgement examines provisions in the European Convention on Human Rights, decisions of the European Court of Human Rights, decisions from some common law countries - the United Kingdom, Australia, South Africa and the United States - and observes the 'trend in civil law jurisdictions', *it does not do so for the purpose of ascertaining whether there is any relevant rule of customary international law.*

The finding which the Chamber makes based upon this examination, is that 'there is a *general rule* that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.'¹¹³

Interpretive Doctrines

¹¹¹ One of the most ardent opponents of this view would be Judge Cassese who stated that "[w]henever reference to national law is not commanded expressly, or imposed by necessary implication, resort to national legislation is not warranted": *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22, Appeals Chamber, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 3 [*Erdemović*, Judge Cassese]. Where national laws must be considered, Judge Cassese notes that "the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law": *ibid.*

¹¹² *Furundžija*, Judge Robinson, *supra* note 89, para. 281.

¹¹³ *Ibid.*, paras. 285-6 [emphasis added].

The serious implication of wholesale importation of general public international law interpretive doctrines into the international criminal law tradition has also been largely unexplored. While a comparative analysis of Articles 31-32 of the *Vienna Convention on the Law of Treaties* and national criminal law interpretive doctrines is beyond the scope of the present analysis, it suffices to recognize that important variances exist, flowing from the basic fact that international rules of interpretation are of general application to disputes between States and do not typically involve the liberty interest of individuals. These international interpretive doctrines are intended to be exhaustive, authorizing extensive use of supplementary materials where required. The consequences of these realizations for international criminal proceedings have already been apparent at the ICTY.

Defence Counsel in *Hadžihasanović* challenged the use of Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* before the ICTY Appeals Chamber. In that case, it was argued that “the object and purpose of the [ICTY] Statute cannot be relied upon to determine whether command responsibility in the context of internal armed conflicts was law in 1993”.¹¹⁴ The unspoken assumption in this statement relates back to the seemingly irreconcilable aims of extending humanitarian protection and ensuring full respect for the rights of the accused. In that case, Defence Counsel implicitly argued that the U.N. Security Council did not have the power to criminalize behavior that was not illegal at the time, even if it would extend humanitarian protection, because it would violate the principle of legality.

¹¹⁴ *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Appeals Chamber, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, 27 November 2002, paras. 94-6 (Defence Motion).

In a Partial Dissenting Opinion in this case, Judge Shabuddeen explicitly discussed the relationship between the interpretive rules set out in the *Vienna Convention on the Law of Treaties* and the maxim *in dubio pro reo* ('uncertainty in the law must be interpreted in favour of the accused'). Due to the relative exhaustiveness of international interpretive doctrines, the maxim which is a fundamental interpretive principle in many national systems was essentially eviscerated – demonstrating the repercussions of relying on public international law interpretive canons to resolve international criminal law issues:

Paragraph 120 of the interlocutory appeal pleads that '(u)ncertainty in the law must be interpreted in favour of the accused'. As I understand the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal proceedings, those injunctions operate on the result produced by a particular method of interpretation but do not necessarily control the selection of the method. *The selection of the method in this case is governed by the rules of interpretation laid down in the Vienna Convention on the Law of Treaties*. It is only if the application of the method of interpretation prescribed by the Convention results in a doubt which cannot be resolved by recourse to the provisions of the Convention itself – *an unlikely proposition* – that the maxim applies so as to prefer the meaning which is more favourable to the accused. In my view, that is not the position here: there is no residual doubt.¹¹⁵

International Human Rights Law as a Dynamic Normative Force

The development of international human rights law after WWII, developed and codified in large measure through international treaties, has played a significant and ongoing role in generating norms that have infused the international criminal law tradition since the advent of the modern *ad hoc* tribunals. The ICTY Trial Chamber went so far as to state in *Furundžija* that "[t]he general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and

¹¹⁵ *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR72, Appeals Chamber, Partial Dissenting Opinion of Judge Shabuddeen: Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 12.

human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.”¹¹⁶

Only after the creation of the United Nations were a litany of treaties adopted and resolutions passed to expand the body of international human rights law. By the time of the creation of the modern *ad hoc* tribunals, international standards for the fair and proper conduct of criminal proceedings in national courts had already taken on a transnational character, making it impossible for these international criminal tribunals to ignore these standards.¹¹⁷ These norms continue to develop over time, evolving independently of international criminal proceedings, and doing so in international human rights bodies, regional human rights courts and national courts. For example, the Statutes of the modern *ad hoc* tribunals which were adopted by the U.N. Security Council include detailed provisions guaranteeing the rights of the accused which are largely taken from Article 14 of the *International Covenant on Civil and Political Rights*.¹¹⁸ In this respect, considering international human rights law as merely persuasive ‘information’ exchanged with international criminal law appears to understate its normative force. The ability of this body of human rights law to develop international criminal law, in particular international criminal evidence and procedure, has already been postulated in very strong terms. As will be seen later, it also raises its head in cases of ambiguity in substantive

¹¹⁶ *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998, para. 183.

¹¹⁷ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003) at 245-7.

¹¹⁸ *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 14; see ICTY Statute, *supra* note 47, art. 21 and ICTR Statute, *supra* note 47, art. 20.

international criminal law, in particular questions of specific application of international humanitarian law.

With respect to criminal procedure and evidence, Richard May and Marieke Wierda have argued that trial fairness, as understood in international human rights law, has been the motivating factor at the modern *ad hoc* tribunals to reconcile differences in national legal traditions. They also argue that regional human rights law, in particular as expounded by the jurisprudence of the European Court of Human Rights, has proven to provide a powerful normative source of international criminal law *principles* of evidence and procedure, such as the concept of equality of arms.¹¹⁹ Christoph Safferling takes the argument one step further, arguing that the only way to bridge the gap between common and civilian legal traditions at the international level is “to find a consensus in a truly international criminal procedure that all states can accept. In order to achieve this, the discussion must begin with what states have already accepted, that is, universal human rights.”¹²⁰ This suggests that there is added strength on the side of ensuring fairness to the accused in the international criminal law tradition, perhaps at the cost of extending humanitarian protection – the other competing tension. Indeed, the normative thrust of international human rights law has now been formally entrenched in Article 21(3) of the Rome Statute of the ICC, which is discussed in detail in Chapter 3, as part of this broader trend in international criminal law. This provision states that “[t]he application and

¹¹⁹ May & Wierda, 1999, *supra* note 18 at 728, 733, n. 22.

¹²⁰ Christoph J. M. Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001) at 367.

interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]”.¹²¹

Filling Gaps in Applicable Law in Practice

Moving from the theoretical towards a more empirical analysis, a selective review of the jurisprudence of the modern *ad hoc* tribunals demonstrates that real gaps have arisen in practice by simply resorting to the public international law sources and interpretive doctrines discussed above. This inquiry is relevant for three purposes. First, it suggests that the balance in the international criminal law tradition between extending humanitarian protection and maximizing the protections of the accused has been highly variable. Secondly, it shows that lacunae in international criminal law do not exist merely where there is no definition of applicable law, as was the case in Chapter 1 concerning its early origins, but rather are a systematic concern that has not been addressed by the adoption of a *de facto* articulation of the applicable law (i.e. Article 38(1) of the ICJ Statute, discussed above). Therefore, there is no basis to assume that a *de jure* articulation of sources of law, as in Article 21 of the Rome Statute, will definitively address this concern.¹²²

Thirdly, this inquiry demonstrates that problems arising from the hybrid character of international criminal law have been deal with, at least in part, by judges at the modern *ad hoc* tribunals treating national laws as constituting *transnational common laws* (as described by Glenn above) which the judges have drawn upon based on their persuasive

¹²¹ ICC Statute, *supra* note 37, art. 21(3).

¹²² This specific hypothesis is examined in Chapter 3.

force. In this way, Article 21(1)(c) of the Rome Statute, discussed in Chapter 3, can be seen to reflect a codification of this approach which eschews the prospect of deriving *rules* of international custom from national laws, in favour of “*general principles* of law derived by the Court from national laws of legal systems of the world”.¹²³ Over time, the cumulative effect of international judicial decision-making on this basis is a body of persuasive jurisprudence, such that resort to national laws has become less and less necessary at the modern *ad hoc* tribunals. As will be discussed in Chapter 3, this process of building an international criminal law tradition on the basis of persuasive, non-binding decisions has been entrenched in Article 21(2) of the Rome Statute.¹²⁴

Problems in Identifying International Custom

The ICTY Appeals Chamber’s decision on jurisdiction in *Tadić* is a foundational case in many respects for the modern *ad hoc* tribunals, not the least of which is because it is one of the very first decisions rendered by an international criminal tribunal since the post-WWII proceedings. This decision also affords a typical example of the way in which these tribunals have approached the task of invoking various sources of law to resolve questions that are not answered in the formal law of these tribunals (i.e. the relevant statutory provisions in their Statutes, and Rules of Procedure and Evidence).

In *Tadić*, the ICTY Appeals Chamber held that violations of customary rules governing internal armed conflicts may incur individual criminal responsibility. It reached this

¹²³ ICC Statute, *supra* note 37, art. 21(1)(c) [emphasis added].

¹²⁴ “The Court *may* apply principles and rules of law as interpreted in its previous decisions”: *ibid.*, art. 21(2) [emphasis added].

conclusion, *inter alia*, extending the rule in international armed conflicts established by the IMT by implicitly invoking the Martens clause, stating: “[p]rinciples and rules of humanitarian law reflect ‘elementary considerations of humanity’ widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”¹²⁵ Placing the Martens Clause, whose role in international criminal law had been historically challenged as discussed in Chapter 1, so centrally in this decision has the effect of inserting a dynamic normative vehicle for extending humanitarian protection in international criminal law, clearly at the expense of the competing interests of ensuring fairness to the accused. Without the *Tadić* decision on jurisdiction, virtually all of the indictments issued by the ICTY would be a nullity.

The ICTY Appeals Chamber in *Tadić* further added that customary international law arrives at the same conclusion. State practice in the following jurisdictions was cited: Belgium (statute), Germany (military manual), New Zealand (military manual), United States (military manual), United Kingdom (military manual), former Socialist Federal Republic of Yugoslavia (criminal code), the Republic of Bosnia and Herzegovina (decree law), and Nigeria (military manual, court martial and civilian court decisions).¹²⁶ With respect to *opinio juris*, the Appeals Chamber relied solely on several U.N. Security Council resolutions regarding the situation in Somalia.¹²⁷ The parties to the conflict in

¹²⁵ *Tadić*, Appeals Decision on Jurisdiction, *supra* note 78, para. 129.

¹²⁶ *Ibid.*, paras. 106, 125, 130, 131.

¹²⁷ *Ibid.*, para. 133.

Bosnia-Herzegovina were also found to have agreed in a treaty to punish violations of international humanitarian law committed in the internal armed conflict.¹²⁸

The approach of the ICTY to finding this very significant rule of customary international law can hardly be classified as rigorous, neither in depth nor breadth of analysis. Only eight jurisdictions were considered, just one of which was a non-Western country. The persuasiveness of relying so heavily on the State practice of jurisdictions which have not had to deal with internal armed conflicts is troubling. Other than in the Nigerian law analysis, there is only cursory citation of provisions in military manuals or national legislation, without any doctrinal support or analysis to lend credibility to the ICTY's interpretation of these provisions. Again, other than a few Nigerian cases, the actual uses of the legislative provisions that exist to purportedly punish violations of international humanitarian law in internal armed conflict are absent. Furthermore, no link is made whatsoever between State practice, on the one hand, and *opinio juris* on the other. They are disjunctively treated – not linked in either time or jurisdictional space.

Similar observations apply at the ICTR, as in *Kabiligi*. In that case, Defence Counsel claimed, *inter alia*, that the indictment was defective on the grounds that it dealt with allegations before the temporal jurisdiction of the ICTR. The Trial Chamber decided that “[a]s to the conspiracy charge, the Trial Chamber finds that the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which the

¹²⁸ *Ibid.*, para. 136.

agreement was made before 1994.”¹²⁹ In arriving at this conclusion, the ICTR Trial Chamber relied on an Australian doctrinal text, case law of the House of Lords, and a decision of a U.S. military tribunal. Based on these sources of law, the ICTR Trial Chamber concluded that the law on conspiracy as it applies to temporal jurisdiction was “clear from the authorities”.¹³⁰

The foregoing critique is significant because it fundamentally questions the theoretical basis for seeking out customary international law *rules* to be applied in the international criminal law tradition. It also suggests that the balance in this tradition between extending humanitarian protection versus maximizing principles of a fair defence has been strongly influenced by developments in international humanitarian law and international human rights law – a trend confirmed by the *Erdemović* case, discussed below.

Reconciling Differences between National Legal Traditions

A critical review of the jurisprudence of the modern *ad hoc* tribunals reveals many instances where these judges were required to answer questions which were unaddressed in their formal law (i.e. their Statutes, and Rules of Procedure and Evidence) by resorting to national laws – which themselves were vastly different or seen to be in conflict. Given such a divergence or conflict among national legal sources, it cannot be argued that these judges were applying international customary law, or ‘general principles of law’. Yet,

¹²⁹ *Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case No. ICTR-96-34-I, Trial Chamber, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio, 13 April 2000, para. 39.

¹³⁰ *Ibid.*, para. 43.

they nevertheless arrived at a definitive statement of the law, sometimes opting to follow one legal tradition over another, and at other times, fashioning their own articulation of the appropriate rule. This body of practice offers strong evidence of a basic element of the international criminal law tradition: that it is largely based on judicial discretion in difficult cases, exercised consistent with Glenn's theory of transnational common laws, often based on favouring either extending humanitarian protection or enhancing fairness to the accused.

The ICTY Trial Chamber decision on hearsay in *Tadić* is paradigmatic of the above hypothesis. In that case, the parties disagreed on whether the common law or civilian approach to resolving this legal question, which was not explicitly addressed in the Rules of Procedure and Evidence, should prevail. Defence Counsel recognized that national rules of evidence do not bind the ICTY, but argued that the adversarial system of trial is more similar to common law jurisdictions which generally presumptively exclude hearsay evidence, with exceptions only where its probative value substantially outweighs its prejudicial effects.¹³¹ On the other side, the Prosecution argued that the ICTY judges are finders of fact in a manner akin to professional civilian judges, where all relevant evidence is generally admissible.¹³² In resolving this impasse, the Trial Chamber noted that there was no general rule excluding hearsay in the ICTY Rules of Procedure and Evidence, and cited Rule 89, discussed earlier.¹³³ The Trial Chamber proceeded to examine the divergent civilian and common law approaches to hearsay evidence, and

¹³¹ *Prosecutor v. Dusko Tadić*, Case No. IT-94-I-T, Trial Chamber, Decision on Defence Motion on Hearsay, 5 August 1996, para. 2 [*Tadić*, Hearsay Decision; on file with author].

¹³² *Ibid.*, para. 3.

¹³³ *Ibid.*, paras. 4-6.

noted that the ICTY itself is a “unique amalgam of civil and common law features”.¹³⁴ In articulating its approach under international criminal law to hearsay evidence, the Trial Chamber stated that it would admit relevant evidence which has probative value, “focusing on its reliability”¹³⁵ such that it “may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems”.¹³⁶ Therefore, the Trial Chamber developed a *sui generis*¹³⁷ articulation of the law on hearsay by drawing from both common law and civilian traditions – but not adopting either completely – and justified this approach as falling within the scope of its Rules of Procedure and Evidence, and being “the most efficient and fair method”.¹³⁸ Indeed, a recent survey of ICTY and ICTR evidentiary law jurisprudence has confirmed the view that judges play a prominent law-making role in reconciling national legal traditions.¹³⁹ There was no attempt by the ICTY Trial Chamber to justify its solution as being a ‘rule of international customary law’ or ‘general principle of law’. The *Tadić* decision on hearsay may thus be viewed as a case of reconciling national legal traditions which are non-binding, but persuasive sources of law for international criminal law.

In the *Erdemović* decision on duress, it was not simply the parties, but also the judges of the ICTY Appeals Chamber which were split on whether duress constituted a complete

¹³⁴ *Ibid.*, para. 14.

¹³⁵ *Ibid.*, para. 19.

¹³⁶ *Ibid.*

¹³⁷ This language was not formally used until the *Delalić* case: see *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, May 1, 1997.

¹³⁸ *Tadić*, Hearsay Decision, *supra* note 131, para. 19.

¹³⁹ See May & Wierda, 1999, *supra* note 18 at 727: “Thus, the presentation of evidence has followed the ‘adversarial’ model, whereas the rules governing the admissibility of evidence may be seen as more akin to the ‘inquisitorial’ model and leave wide discretion to the judges.”

defence to war crimes or crimes against humanity involving the 'killing of innocent people'. The five-member panel agreed that this question was unresolved in the ICTY Statute, Rules of Procedure and Evidence, and international treaties. They also agreed that there was a rift between civilian jurisdictions that permitted duress as a complete defence to all offences, and common law jurisdictions that generally denied duress in cases of murder, but treated it as a mitigating factor at sentencing. Despite this consensus, there was deep division in the Appeals Chamber regarding the basis on which the issue should be resolved, and four separate opinions were rendered.

The majority in *Erdemović*, composed of Judge McDonald, Judge Vohrah and Judge Li found "that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."¹⁴⁰ They resolved the gap in international criminal law by explicitly resorting to 'practical policy considerations', namely the imperative of extending humanitarian protection to deny duress as a defence to the killing of innocent people. Judge Cassese and Judge Stephen dissented, each writing separate opinions. Judge Cassese's denial of ambiguity in international criminal law on this issue is suspect, and his admission that if there was ambiguity, it should be resolved in favour of the accused is quite telling. For its part, Judge Stephen's dissenting opinion mirrors Glenn's theory of transnational common laws, with the civilian approach to duress being more persuasive and more suitable to the interests of justice.

¹⁴⁰ *Prosecutor v. Drazan Erdemović*, Case No. IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997, para. 19.

Judge McDonald and Judge Vohrah began their analysis by citing Article 38 of the ICJ Statute under a heading entitled 'Applicable Law'.¹⁴¹ They turned to consider customary international law and then general principles of law to ascertain whether duress could be a defence to the alleged offence. In evaluating the state of customary international law, case law of the post-WWII military tribunals was evaluated. The *Einsatzgruppen* decision of the U.S. Military Tribunal was challenged for failing to cite any authority for its statement that duress could be a complete defence, and Judge McDonald and Judge Vohrah found it was "in discord with the preponderant view of international authorities".¹⁴² They also rejected case law from Germany, Belgium, Israel, France, the former U.S.S.R., the former Yugoslavia, and Italy which had been offered to support the view of duress as a complete defence, stating that these cases "are insufficient to support the finding of a customary rule [...] a number of the cases are of questionable relevance and authority."¹⁴³ Turning to national legislation, they found there was no uniform state practice. They observed the clear split between the civil and common law tradition on this issue. Defence Counsel provided evidence that at least fourteen civil law jurisdictions (including the former Yugoslavia) permit necessity or duress to be exculpatory for all crimes.¹⁴⁴ However, Judge McDonald and Judge Vohrah noted that

¹⁴¹ *Erdemović*, Judges McDonald and Vohrah, *supra* note 35, para. 40.

¹⁴² *Ibid.*, para. 44. The U.S. Military Tribunal had held as follows: "Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.": cited in *ibid.*, para. 43.

¹⁴³ *Ibid.*, para. 48.

¹⁴⁴ The jurisdictions included Austria, Belgium, Brazil, Greece, Italy, Finland, the Netherlands, France, Germany, Peru, Spain, Switzerland, Sweden and the former Yugoslavia: *ibid.*, para. 49.

common law jurisdictions reject duress as a defence to murder, with the exception of “a few states” in the United States.¹⁴⁵

Turning to general principles of law, differences between civilian, common law, and ‘other’ systems (e.g. Japan, China, Morocco, Somalia, and Ethiopia) were provided. After this basic review, Judge McDonald and Judge Vohrah engaged in a more detailed assessment of how duress operates in civilian jurisdictions in practice. However, they were unable to reconcile the diverse approaches in national law, stating:

It is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons. It is not possible to reconcile the opposing positions and, indeed, we do not believe that the issue should be reduced to a contest between common law and civil law.¹⁴⁶

To set out an ‘applicable rule’ governing duress in the case, Judge McDonald and Judge Vohrah appealed to the “normative mandate of international criminal law”.¹⁴⁷ In so doing, they explicitly opted to decide the case based on extending humanitarian protection (arguably at the expense of ensuring fairness to the accused), stating:

we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered [...] *It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application* by recognising the normative effect which criminal law should have upon those subject to them.¹⁴⁸

A fundamental tension in the international criminal law tradition is at the very crux of this ‘tough case’ in which a clear gap existed in the existing corpus of international criminal

¹⁴⁵ *Ibid.*, para. 49.

¹⁴⁶ *Ibid.*, para. 72.

¹⁴⁷ *Ibid.*, para. 73.

¹⁴⁸ *Ibid.*, para. 75.

law. While rejecting duress as a defence on the basis of the policy behind international humanitarian law, Judge McDonald and Judge Vohrah still gave some credence to the competing tension in international criminal law with respect to fairness to the accused, by stating that duress can operate as a mitigating factor at sentencing.¹⁴⁹ It must be stressed that it was not international humanitarian law itself which provided the answer for Judge McDonald and Judge Vohrah, indeed it is silent on criminal defences, but rather the general policy behind international humanitarian law. These judges were unapologetic in their explanation of the final basis for their decision to deny duress as a defence to the offences alleged, indicating it is not grounded, strictly speaking, in pre-existing law:

We do not think our reference to considerations of policy are improper. It would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy [...] The approach we take does not involve a balancing of harms for and against killing but rests upon an application in the context of international humanitarian law of the rule that duress does not justify or excuse the killing of an innocent person.¹⁵⁰

Similarly, Judge Li's concurring opinion was founded largely on extending humanitarian protection, but also explicitly drew on those national laws which are 'best suited' to the context of the case. This approach demonstrated resort to the persuasiveness of transnational common laws, such that "this International Tribunal cannot but opt for the solution best suited for the protection of innocent persons."¹⁵¹ The majority decision in *Erdemović*, therefore, cannot be said to be grounded in Article 38(1) of the ICJ Statute – these general doctrines of public international law having failed to provide an answer to the fundamental question at stake in *Erdemović*, at least according to the majority's reasoning.

¹⁴⁹ See *ibid.*, paras. 86-7.

¹⁵⁰ *Ibid.*, paras. 78, 80.

¹⁵¹ *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, Appeals Chamber, 7 October 1997, para. 8.

On the other side of the debate, Judge Cassese held in his dissenting opinion that “international criminal law on duress is not ambiguous or uncertain”.¹⁵² He proceeded by identifying four conditions which must be satisfied in order for duress to provide a defence under international criminal law, based on “relevant case-law [that] is almost unanimous”¹⁵³ (i.e. severity of threat, no means of escape, proportionality of means taken, and threat not self-induced). The ‘relevant case-law’ cited by Judge Cassese consisted of several decisions of the post-WWII military tribunals, and national decisions from the Netherlands, Israel and Canada.¹⁵⁴ These provided, according to Judge Cassese’s reasoning for a ‘general rule’ of customary international law that duress may offer a defence to an accused. Judge Cassese described the Prosecution as attempting to fashion an ‘exception’ in customary international law to disallow duress as a defence for offences involving the ‘killing of innocent persons’.¹⁵⁵ Judge Cassese argued that the “manifest inconsistency of State practice warrants the dismissal of the Prosecution’s contention: no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes involving the killing of persons”.¹⁵⁶ The logic applied by Judge Cassese on this point is quite malleable and, therefore, suspect. It could just as easily be argued that a ‘general rule’ of international criminal law is that the individual criminal responsibility of an accused can only be negated or excused based on a defence recognized under international law. Since duress is not recognized as a defence

¹⁵² *Erdemović*, Judge Cassese, *supra* note 111, para. 49.

¹⁵³ *Ibid.*, para. 16.

¹⁵⁴ *Ibid.*, n. 10.

¹⁵⁵ *Ibid.*, para. 18.

¹⁵⁶ *Ibid.*, para. 40.

to the offences charged, and Judge Cassese falls short of finding a 'specific rule' permitting duress as a defence to the 'killing of innocent persons', then the purported defence would not exist.

Judge Cassese is harsh in his criticism of the majority opinions, which he characterized as being based solely on 'extraneous' public policy considerations:

the majority of the Appeals Chamber has embarked upon a detailed investigation of 'practical policy considerations' and has concluded by upholding 'policy considerations' substantially based on English law. I submit that this examination is extraneous to the task of our Tribunal. This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. [...] What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*.¹⁵⁷

While rejecting 'policy considerations' as a relevant basis of decisions by international criminal tribunals, later in his dissenting opinion Judge Cassese nevertheless buttresses his position in a section entitled 'Concluding considerations' by invoking what could reasonably be called policy considerations, stating: "Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards."¹⁵⁸

In a very revealing passage, Judge Cassese stated that *if* there was ambiguity or a gap in international criminal law concerning duress, then the ICTY should have made "appropriate and judicious [...] recourse – as a last resort - to the national legislation of the accused, rather than to moral considerations or policy-oriented principles," given that

¹⁵⁷ *Ibid.*, para. 11.

¹⁵⁸ *Ibid.*, para. 47.

the accused was “required to know those national provisions and base his expectations on their contents”.¹⁵⁹ However, there is no authority cited by Judge Cassese for filling gaps in international criminal law by applying the national law ordinarily applicable to the accused. His only justification for this approach is: first, that the accused would have known national law; and second, that applying national law is preferable to applying principles of morality or policy considerations. That combatants would have *known* that their national law permitted duress as a defence could only be relevant for the purposes of ensuring legal certainty in armed conflict, or ensuring fairness to an accused who acted in good faith on what he believed to be legal – Judge Cassese specifically refers to the maxim *in dubio pro reo* in this regard.¹⁶⁰ Holding the accused to two different standards, not knowing which would apply, would be ‘unfair’ the argument would go. These considerations, however, which flow from Judge Cassese’s reasoning are all arguably ‘policy considerations’ which he has strenuously argued are generally erroneous before international tribunals. Therefore, we are brought back to the intractable tension in the international criminal law tradition between extending humanitarian protection, versus ensuring fairness to the accused.

In the final dissenting opinion in *Erdemović*, Judge Stephen began by disputing the persuasive authority of the post-WWII jurisprudence on the grounds that they merely applied the national law that the judges of those courts were most familiar with,¹⁶¹ a

¹⁵⁹ *Ibid.*, para. 49.

¹⁶⁰ *Ibid.*

¹⁶¹ Judge Stephen held: “The post-Second World War military tribunals do not appear to have acted in relation to duress in conscious conformity with the dictates of international law”: *Erdemović*, Judge Stephen, *supra* note 68, para. 24.

general contention examined in Chapter 1. Judge Stephen then turned to examine general principles of law as articulated in Article 38(1)(c) of the ICJ Statute, agreeing with the theoretical approach articulated by Judge McDonald and Judge Vohrah regarding the ability of general principles to fill lacunae in international law.¹⁶² Characterizing the divergence of the common law and civilian tradition on this issue, Judge Stephen simply indicated preference for the latter and justified this decision based on favouring the tension within international criminal law of ensuring fairness to the accused: “not only because of the approach of the civil law but also *as a matter of simple justice* [...] In searching for a general principle of law the enquiry must *go beyond the actual rules* and must seek the reason for their creation and the manner of their application.”¹⁶³ Later, Judge Stephen rejected the competing tension in international criminal law of extending humanitarian protection on the facts of the case as alleged, arguing that it “is not achieved by the denial of a just defence to one who is in no position to effect by his own will the protection of innocent life.”¹⁶⁴ This reasoning shows hints of a rare attempt to reconcile the competing aims of international criminal law.

Judge Stephen proceeded to attack the common law position, interestingly by relying on some common law jurisprudence and doctrine itself which admits that there is an “absence in the common law of any satisfying and reasoned principle governing the exclusion of duress in the case of very serious crimes including murder”.¹⁶⁵ Judge Stephen also sought to distinguish the common law position since it is “based upon

¹⁶² *Ibid.*, para. 25.

¹⁶³ *Ibid.*, paras. 26, 63 [emphasis added].

¹⁶⁴ *Ibid.*, para. 65.

¹⁶⁵ *Ibid.*, paras. 29ff.

situations in which an accused has had a choice between his own life and the life of another as distinct from cases where an accused has no such choice, it being a case of either death for one or death for both.”¹⁶⁶

However, in a series of questionable moves, Judge Stephen seeks to declare a general principle of law recognizing duress as a defence on that basis that a “general principle governing duress is therefore more likely to be found in these general rules [i.e. civilian rules] than in specific exceptions which exist for particular crimes [i.e. common law rules].”¹⁶⁷ With respect, this is merely a play-on-words with the word ‘general’ in ‘general principles of law’. The existence of exceptions to rules of law in national systems cannot reasonably invalidate those national laws from analysis – to the contrary their divergence from other approaches which do not recognize such exceptions make it more difficult to declare a general principle of law exists. Based on the preceding analysis, Judge Stephen purported to declare a narrow general principle of law that could perhaps enable duress to operate on the facts alleged by the accused in the case:

despite the exception which the common law makes to the availability of duress in cases of murder where the choice is truly between one life or another, the defence of duress can be adopted into international law as deriving from a general principle of law recognized by the world’s major legal systems, at least where that exception does not apply [i.e. as in this case where the choice was allegedly between one life being lost or *both* being lost].¹⁶⁸

The *Erdemović* decision, therefore, represents a microcosm for the development of the international criminal law tradition, bringing to light its fundamental tensions and basic aspects which began with its origins at Nuremberg and have only grown more apparent in

¹⁶⁶ *Ibid.*, para. 25.

¹⁶⁷ *Ibid.*, para. 63.

¹⁶⁸ *Ibid.*, para. 66.

concrete cases at the modern *ad hoc* tribunals. It is a harbinger of the very type of elementary questions regarding the guilt or acquittal of an accused which will continue to fall within the gaps in international criminal law.

Non-Binding Nature of Transnational Common Laws

While the cases discussed above have dealt with instances where the modern *ad hoc* tribunals have filled lacunae by relying on the persuasive force of transnational common laws, often by choosing between favouring humanitarian protection or fairness to the accused, it is equally important to examine the truly non-binding nature of these transnational common laws by showing cases where they have been deliberately set aside.¹⁶⁹ Richard May and Marieke Wierda confirm this view, arguing that international criminal law must not be exclusively grounded in common or civilian law, “or even a combination of the two”.¹⁷⁰ Thus, even where transnational common laws, such as the common laws of Europe,¹⁷¹ are in complete agreement, they may be denied normative force. This is a further element of establishing that the concept of transnational common laws may be the dominant explanatory theory behind the international criminal law tradition. Some clear evidence of this kind is provided in the ICTR Appeal Chamber decision in *Bagosora*.

¹⁶⁹ This concept has also been codified, in part, in Rule 89(A) of the Rules of Procedure and Evidence of these tribunals, cited earlier, which denies binding authority to national evidentiary law: ICTY Rules, *supra* note 48, r. 89(A): “A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.” ICTR Rules, *supra* note 48, r. 89(A): “The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.”

¹⁷⁰ May & Wierda, 1999, *supra* note 18 at 728.

¹⁷¹ See Glenn, *On Common Laws*, *supra* note 98 at c. 1.

In that case, the Prosecutor argued that there was an inherent right of appeal against the decision of the confirming judge to dismiss the indictment. Among other arguments, the Prosecutor unsuccessfully sought to rely on provisions in national jurisdictions in both civilian and common law systems as evidence of a general principle of law. The reasoning of the ICTR Appeals Chamber in rejecting this argument is not easily understood without resort to Glenn's theory of transnational common laws:

46. The Prosecutor submits that an inherent right of appeal may be founded on the practice of courts in national jurisdictions. It is argued that a survey of national law indicates the existence of a general principle of law that, in the absence of an express provision to the contrary, a right of appeal generally lies from the decisions of a lower court. The Prosecutor cites provisions from the Codes of Criminal Procedure of the civil law jurisdictions of France, Senegal and Germany, where decisions of lower courts dismissing an indictment may always be appealed to a superior court, and the remedies of mandamus and certiorari in the common law jurisdictions of the United States and the United Kingdom.

47. In the view of the Prosecutor, the Appeals Chamber may extrapolate an analogue of such rules to find jurisdiction in the instant appeal. The Prosecutor argues that general principles of law may be applied by international courts, citing, *inter alia*, Article 38 of the Statute of the International Court of Justice and the jurisprudence of the ICTY.

48. The Appeals Chamber notes, however, that each of the rules cited by the Prosecutor is based on an explicit statutory provision in the national jurisdiction concerned. The Appeals Chamber, therefore, finds them inapplicable in the instant matter.¹⁷²

If we take the ICTR Appeals Chamber's reasons in *Bagosora* at face value, it is difficult to envisage a situation where it could ever fill lacunae in its Rules of Procedure and Evidence by resort to general principles of law. The fact that the rules governing inherent rights of appeal are codified in national legislation, as opposed to some other form such as case law, is entirely irrelevant. Indeed, if an international criminal tribunal should generally completely ignore national laws simply on account of their codification (which is different from considering them and finding them unpersuasive), it would be prohibited from considering the civilian legal tradition, and indeed, many common law jurisdictions

¹⁷² *Bagosora*, Appeals Decision, *supra* note 92, paras. 46-9 [footnotes omitted].

which have codified much of their criminal law. Therefore, the reasons of the ICTR Appeals Chamber in *Bagosora* must be recast: its true reasons for denying an inherent right of appeal are opaque or hidden, much in the way that certain decisions made by the IMT were not fully reasoned, as discussed in Chapter 1. *Bagosora* can be understood as affirming the non-binding nature of transnational common laws. While it may be that accord among these transnational common laws would typically make them more persuasive, this never excludes the possibility that international judges may refuse to follow them. Such an outcome is fully accommodated in Glenn's theory of transnational common laws.

Precedence and an International Criminal Jurisprudence

Once they have been made, what role do national and international judicial decisions play in the international criminal law tradition? Consistent with Glenn's theory of transnational common laws, we would expect them to play a persuasive, but non-binding role. This is largely the approach which has been taken at the modern *ad hoc* tribunals.

With respect to judicial decisions made outside its Chambers, the ICTY has not considered itself to be 'bound' by the decisions of other international courts or tribunals such as the IMT or IMTFE,¹⁷³ but stated that these are merely more persuasive than national decisions:

In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same

¹⁷³ *Prosecutor v. Zoran Kupreškić*, Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000, para. 540 [*Kupreškić*, Trial Judgement].

corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.¹⁷⁴

What of its own jurisprudence? The treatment given to prior decisions of the Trial and Appeals Chambers of the modern *ad hoc* tribunals is not explicitly addressed in either their Statutes or Rules of Procedure and Evidence.¹⁷⁵ This situation presents a dilemma given the position on this issue of various streams which feed into the international criminal law tradition. While higher courts in the common law tradition may bind lower courts by their decisions, there is no similar legal requirement in civilian traditions.¹⁷⁶ In public international law, as in Article 59 of the ICJ Statute,¹⁷⁷ binding precedence is not strongly conceived.

In 2000, the ICTY Appeals Chamber in *Aleksovski* definitively stated that the “*ratio decidendi* of its decisions is binding on Trial Chambers”, owing to: the hierarchical structure of the tribunal; the need to ensure “certainty and predictability in the application of the applicable law” (similar wording to Control Council Law No. 10, discussed in Chapter 1); fairness to the accused because like cases must be treated alike (favouring one of the fundamental poles in the international criminal law tradition); and the intention of the U.N. Security Council in creating the tribunals which “envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified,

¹⁷⁴ *Ibid.*, para. 542.

¹⁷⁵ Claire Harris, “Precedence in the Practice of the ICTY” in May, *supra* note 108 at 341.

¹⁷⁶ Discussed in *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000, para. 112 [*Aleksovski*, Appeals Judgement].

¹⁷⁷ ICJ Statute, *supra* note 31, art. 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”

coherent and rational corpus of law.”¹⁷⁸ With respect to decisions of Trial Chambers, the Appeals Chamber essentially adopted the shared common law and civilian approach, stating that other Trial Chambers may find such decisions to be persuasive, but that they have “no binding force on each other”.¹⁷⁹

The fundamental question of whether the Appeals Chamber is bound by its own prior decisions was also addressed in *Aleksovski*, where the Prosecution argued for the common law position of *stare decisis* which is only departed from if a previous decision is ‘clearly erroneous and cannot stand’, even though it was recognized that this is not a general principle of law. On the other hand, the Defence argued that “the Tribunal may apply only rules of international humanitarian law which are beyond any doubt part of customary law, and the Report [of the U.N. Secretary General creating the ICTY] makes no mention of judicial precedence as a source of law.”¹⁸⁰ Resolving this question, the Appeals Chamber observed that the “trend which emerges from an examination of common law jurisdictions is that their highest courts will normally consider themselves bound by their previous decisions, but reserve the right to depart from them in certain circumstances.”¹⁸¹ While the highest courts in civilian jurisdictions tend in practice to follow their prior decisions, the Appeals Chamber noted that this is not because such decisions are viewed as binding.¹⁸² International courts similarly do not have a notion of binding precedence, but afford their prior decisions significant weight. The Appeals

¹⁷⁸ *Aleksovski*, Appeals Judgement, *supra* note 176, para. 113.

¹⁷⁹ *Ibid.*, para. 114.

¹⁸⁰ Harris, *supra* note 175 at 346.

¹⁸¹ *Aleksovski*, Appeals Judgement, *supra* note 176, para. 92.

¹⁸² *Ibid.*, para. 93.

Chamber found this practice to be non-determinative, and instead resolved the issue based on the need for “certainty, stability and predictability in criminal law”,¹⁸³ and the right of the accused to a fair trial which includes the right of appeal where like cases are treated alike as well as where errors of law in past appellate decisions are corrected.¹⁸⁴ The ultimate rule adopted in *Aleksovski*, therefore, was that “the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.”¹⁸⁵

Taken together, the approach of the ICTY Appeals Chamber in *Aleksovski* to the nature of prior Appeals Chamber decisions to other Trial Chambers, and subsequent Appeals Chambers, may be seen as an attempt to reconcile the typically competing aspects of the international criminal law tradition. By ensuring Appeals Chambers’ decisions are binding on Trial Chambers, and should generally be followed by subsequent Appeals Chambers, international criminal law can develop over time and be applied clearly and concisely, thus enhancing humanitarian protection. Likewise, the rule encourages fairness to the accused by ensuring that like cases are treated alike, but allows for the exception that a prior Appeals Chamber decision may be disregarded where it is contrary to the interests of justice.

Moving forward, it is pertinent to consider the extent to which the jurisprudence of the modern *ad hoc* tribunals may serve as persuasive, non-binding precedence for the ICC.

¹⁸³ *Ibid.*, para. 101.

¹⁸⁴ *Ibid.*, paras. 104-6.

¹⁸⁵ *Ibid.*, para. 107.

Only time will tell the answer to this question, but it is already apparent in the Rome Statute that some of the case law of the modern *ad hoc* tribunals has been set aside. For example, the majority decision in *Erdemović* regarding the defence of duress was not followed in the drafting of the defences section of the Rome Statute.¹⁸⁶ Furthermore, how will the decisions of the ICC Pre-Trial Chamber, Trial Chamber, and Appeals Chamber be treated in other cases before the ICC? Article 21(2) of the Rome Statute appears to retreat from the approach of the common law tradition and the modern *ad hoc* tribunals, instead favouring an approach of mere persuasive authority akin to the civilian tradition, stating: “[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions.”¹⁸⁷ These issues will be addressed in further detail in Chapter 3.

Significance of Maturing Judicial Institutional Structure

The advent of the modern *ad hoc* tribunals represents a crucial step in the development of international criminal law. Their jurisprudence establishes some basic continuity with key principles from the post-WWII tribunals, most notably individual criminal responsibility for serious violations of international humanitarian law. The judicial institutions of the modern *ad hoc* tribunals have played an important role in advancing international criminal law in several ways.

First, unlike the IMT which was concerned with only one mega-trial to prosecute individuals on one side of an armed conflict, the modern *ad hoc* tribunals have prosecuted

¹⁸⁶ Geert-Jan Alexander Knoops, *An Introduction to the Law of the International Criminal Tribunals* (Ardsley, NY: Transnational Publishers, Inc., 2003) at 74; see ICC Statute, *supra* note 37, art. 31(1)(d).

¹⁸⁷ ICC Statute, *supra* note 37, art. 21(2).

dozens of accused on different sides of their respective armed conflicts. These multiple proceedings have resulted in hundreds of decisions being made on evidentiary and procedural matters, and dozens of landmark judgments on substantive matters of international criminal law. This has enabled the refinement and development of evidentiary, procedural and substantive law in a way that would not have been possible otherwise. The jurisprudence thus represents a growing corpus of international criminal law.

Second, unlike the post-WWII tribunals which were only loosely affiliated and did not have an appellate structure, the ICTY and ICTR have a common Appeals Chamber and other institutional connections that have facilitated a more coherent development of international criminal law. Ilias Bantekas and Susan Nash explain that the “intention behind these common institutions was the development of a balanced and coherent jurisprudence, which has evidently been achieved.”¹⁸⁸ While they were created as non-permanent tribunals, the “[t]he creation of the Rwanda Tribunal showed that the machinery designed for the Yugoslavia Tribunal could be employed for other specific circumstances and offenses, thereby avoiding the need to reinvent the wheel in response to each global humanitarian crisis.”¹⁸⁹ On the other hand, it should be noted that “at least one permanent member of the Security Council, China, has openly expressed concern

¹⁸⁸ Ilias Bantekas & Susan Nash, *International Criminal Law*, 2nd ed. (London: Cavendish Publishing Ltd., 2003) at 340; see ICTR Statute, *supra* note 47, art. 12(2).

¹⁸⁹ Michael P. Scharf, “The Prosecutor v. Dusko Tadić: An Appraisal of the First International War Crimes Trial Since Nuremberg” (1997) 60 Albany Law Review 861 at 880.

about using the Yugoslavia Tribunal as precedent for the creation of other *ad hoc* criminal tribunals”¹⁹⁰

Third, the judges of the modern *ad hoc* tribunals are not nationals of the victorious parties of the armed conflict, or their allies, as was the case with the post-WWII tribunals, but rather have been elected by the U.N. General Assembly from nominations provided to the U.N. Security Council by Member States, “taking due account of the adequate representation of the principal legal systems of the world.”¹⁹¹ Additionally, guidelines for the geographic distribution of staff members in Chambers who advise the judges of the modern *ad hoc* tribunals also helps to ensure that more national laws become accessible as a matter of practice to Chambers. The legal tradition from which these judges hail has been noted by commentators. For example, in the *Tadić* decision on hearsay, Richard May and Marieke Wierda noted that “[t]his ruling from a Trial Chamber composed of essentially common law judges was approved and followed by another Trial Chamber of essentially civil law judges in another case”.¹⁹²

Fourth, the office of the President of the Tribunal is a significant institutional feature of the modern *ad hoc* tribunals. In addition to presiding over both the ICTY and ICTR Appeals Chamber, the role of the President has developed substantially to encompass judicial, administrative, diplomatic and even political functions. The President has

¹⁹⁰ *Ibid.*, at 881.

¹⁹¹ ICTY Statute, *supra* note 47, arts. 13bis(1)(c), 13ter(1)(c); see also Kittichaisaree, *supra* note 11 at 23.

¹⁹² May & Wierda, 1999, *supra* note 18 at 747 citing *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Trial Chamber, Decision, 21 January 1998.

facilitated the rule-making function of the judges of the modern *ad hoc* tribunals in the process of improving the Rules of Procedure and Evidence.¹⁹³

Finally, and perhaps most significant from the perspective of the ICC's institutional structure, the modern *ad hoc* tribunals did not have any external quasi-legislative body to enact, approve or amend their respective Rules of Procedure and Evidence, nor to change the substantive law they declared, as the case may be. Judge Hunt in *Aleksovski* recognized the implications of institutional constraints at the international level in developing and refining international criminal law, stating: "unlike in domestic systems, there is no legislative body readily able to fine-tune its Statute when a decision of the Appeals Chamber is subsequently seen to have produced an injustice. It is quite unrealistic to expect the Security Council of the United Nations to perform that task."¹⁹⁴ Similarly, in *Erdemović*, Judge Cassese addressed the significance of institutional differences between national and international criminal courts:

The philosophy behind all national criminal proceedings, whether they take a common-law or a civil-law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.¹⁹⁵

The role of the Assembly of States Parties in relation to the ICC adds an interesting reply to these statements by Judge Hunt and Judge Cassese, which will be discussed in Chapter 3.

¹⁹³ Jon Cina and David Tolbert, "The Office of the President: A Third Voice" in May, *supra* note 108 at 86-90.

¹⁹⁴ *Aleksovski*, Judge Hunt, *supra* note 89, para. 5.

¹⁹⁵ *Erdemović*, Judge Cassese, *supra* note 111, para. 5.

Conclusion

While the creation of the modern *ad hoc* tribunals makes it possible to conceive of an emergent international criminal law tradition, the foregoing analysis shows that their attempts to theoretically define sources of law and interpretive principles solely by reference to public international law has been insufficient. In practice, gaps which have emerged in the *de facto* definition of applicable law taken from Article 38 of the ICJ Statute have been filled by resort to judicial discretion which draws upon persuasive, non-binding precedent from transnational common laws. In some cases, the persuasive rationale is unstated by these judges, or weak attempts are made to justify their decisions as fully consistent with general principles of public international law. However, notable instances in the jurisprudence have been presented which demonstrate that the fundamental debate in the international criminal law tradition between enhancing humanitarian protection versus ensuring fairness to the accused has been the turning point in difficult cases. In rare instances, there have been attempts to reconcile these competing aims which have been at the core of the international criminal law tradition since its birth. As these decisions have accumulated over time at the modern *ad hoc* tribunals, a basic system of precedence has been adopted to attempt to achieve an agenda of reconciling these aims.

Why then has the recent trend in international criminal law since the modern *ad hoc* tribunals been to attempt to codify the sources of applicable law, alter the way in which

this body of law should evolve, and revise the type of precedence which should apply?¹⁹⁶

In particular, how does Article 21 of the Rome Statute, and the institutional structure of the ICC, differ from the approach that has prevailed at the modern *ad hoc* tribunals? Does it purport to fill gaps in international criminal law, and, if so, how effective is it in doing so? How does it affect the fundamental tensions in the international criminal law tradition between enhancing humanitarian protection versus ensuring fairness to the accused? How could the notion of transnational common laws operate in the ICC consistent with, or in spite of, Article 21 of the Rome Statute? What is the nature of past decisions of the ICC in this new system? These are the fundamental questions in sustaining the international criminal law tradition to which Chapter 3 is directed.

¹⁹⁶ See, e.g., ICC Statute, *supra* note 37, art. 21; United Nations Transitional Administration in East Timor, Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, s. 3, online: United Nations <<http://www.un.org/peace/etimor/untactR/Reg0015E.pdf>>; Special Court for Sierra Leone, *Rules of Procedure and Evidence*, adopted on 16 January 2002, as amended to 14 May 2005, r. 72bis, online: SCSL <<http://www.sc-sl.org/rulesofprocedureandevidence.pdf>>; *Statute of the Special Court for Sierra Leone* in Report the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000), arts. 14, 19(1), 20(3), online: SCSL <<http://www.sc-sl.org/scsl-statute.html>>; Statute of the Iraqi Special Tribunal, 10 December 2003, art. 17, online: Coalition Provisional Authority <http://www.cpa-iraq.org/human_rights/Statute.htm>.

CHAPTER 3

Sustaining the International Criminal Law Tradition: ICC

The project of creating a permanent international criminal court has a long history, but only really gained traction around the same time that the first modern *ad hoc* was being established. Owing to the fact that the negotiation process of drafting a statute for the ICC took place alongside the developments discussed in Chapter 2, the modern *ad hoc* tribunals continued to promulgate important jurisprudence well after the Rome Statute was finalized. The thinking that went into the ICC, therefore, represents an effort to build on the early lessons from these tribunals, as well as an independent exercise in redefining the international criminal law tradition – without the benefit of the full experience of the modern *ad hoc* tribunals. There are many important differences between the Rome Statute and the substantive, procedural and evidentiary law developed by the modern *ad hoc* tribunals, but the most germane for the purposes of this thesis is Article 21, which for the first time in history seeks to elucidate sources of international criminal law.¹⁹⁷ This provision states:

Article 21
Applicable law

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

¹⁹⁷ Margaret McAuliffe de Guzman, “Article 21: Applicable Law” in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 435 at 438.

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3,¹⁹⁸ age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.¹⁹⁹

Article 21 of the Rome Statute is worded in a very cumbersome manner. It can only be understood in the context in which it was drafted: by round after round of negotiation and compromise. It raises the most theoretical as well as the most practical challenges to the viability of the international criminal law tradition. The justification for the provision is both to provide a normative super-structure to the tradition, as well as fill gaps in the law to be applied. However, as will be seen, it may fail to meet either of these objectives and risks undermining the entire project of the ICC.

While the Rome Statute formally restricts the law-making authority of international judges with respect to procedural and evidentiary law in many ways, there is ample room in Article 21 to determine the law. The fundamental tensions in the international criminal law tradition between extending humanitarian protection and ensuring fairness to the accused have been aggravated, both in terms of specific rules as well as institutional arrangements. The operation of Article 21 confirms the hypothesis that Glenn's theory of

¹⁹⁸ Article 7(3) of the Rome Statute relates to crimes against humanity and states: "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.": ICC Statute, *supra* note 37, art. 7(3).

¹⁹⁹ *Ibid.*, art. 21.

transnational common laws has a strong explanatory value for what is going on in the application of law. Finally, the long-term viability of the ICC remains an open question on the terms of Article 21(2), and two competing visions will be presented of the future of the international criminal law tradition in this regard. The possibility of a coherent jurisprudence developing in light of these significant obstacles is by no means certain.

Aims of the Applicable Law Provision

Why was a *de jure* provision on ‘applicable law’ required in light of the *de facto* applicable law provisions applied by the modern *ad hoc* tribunals and historical tribunals? Without debating the content of such a provision, its mere existence is the first juncture for analysis. Article 21 of the Rome Statute has been called “a tissue of imperfectly defined sources”,²⁰⁰ and its adoption has been justified on several grounds – which may be seen as recurring themes in the development of international criminal law, based on the foregoing chapters.

First, given the hybrid nature and newness of this tradition, an applicable law provision was thought necessary to resolve challenges of “normative indeterminacy inherent in the development of international legal norms.”²⁰¹ The promise of Article 21 in this regard is to provide a normative framework or structure for the entire legal world overseen by the ICC. Second, most commentators agree that Article 21 was designed to serve a ‘gap-filling’ function to fill lacunae where substantive, procedural or evidentiary rules are

²⁰⁰ Alain Pellet, “Applicable Law” in Antonio Cassese *et al.*, eds., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford: Oxford University Press, 2002) 1051 at 1053.

²⁰¹ de Guzman, *supra* note 197 at 439.

apparently lacking.²⁰² An important distinction is made with respect to gap-filling in national law and in the international criminal law tradition. It has been recognized that national law is “anchored in a fine network of legal norms [i.e. a legal tradition] that lay down rules that are intricately interwoven with the codes.”²⁰³ The problem is that international criminal law has no norms to anchor itself to. It has no longstanding tradition, only a tentative and uncertain existence with little theoretical basis. Without an established tradition behind it, international criminal law is a law seeking out a tradition – hence the paradox of it being an ‘emerging’ legal tradition. Ironically, this predicament is both the root of the problem that Article 21 of the Rome Statute seeks to address, as well as the reason why Article 21 is unlikely to succeed in patching together a legal tradition.

As the analysis in the preceding chapter demonstrates, however, resort to transnational common law has been the way that the modern *ad hoc* tribunals have generally filled the most difficult gaps in their statutes, as well as by deciding between tensions of extending humanitarian protection versus fairness to the accused. The extent to which Article 21 constrains or condones this approach warrants attention. Before delving into this analysis, however, it is necessary to situate this provision within the broader developments in the international criminal law tradition to understand its implications.

Separation from Tradition of Public International Law

²⁰² J. Verhoeven, “Article 21 of the Rome Statute and the Ambiguities of Applicable Law” (2002) 33 *Netherlands Yearbook of International Law* 3 at 17; de Guzman, *supra* note 197 at 443; Kittichaisaree, *supra* note 11 at 52.

²⁰³ Pellet, *supra* note 200 at 1067.

Article 21 of the Rome Statute represents a split, at least in part, from the dominance of general public international law in international criminal law. This single source that could have grounded an international criminal law tradition, and indeed the source relied upon by the earlier international criminal tribunals, has been fatally undermined. This is not to deny the strong and ongoing role of public international law, but merely to identify that its exclusivity over international criminal law is denied in the Rome Statute and, therefore, for the definition of this tradition moving forward. This view is not without its detractors.

To begin with, Margaret McAuliffe de Guzman has noted that while the applicable law provision in the Rome Statute is generally inspired from Article 38 of the ICJ Statute, Article 21 “modifies the approach taken in the ICJ Statute to fit the context of international *criminal* law.”²⁰⁴ By the time of the Rome Conference, it was clear that international criminal tribunals were applying Article 38 of the ICJ Statute as a matter of practice. Therefore, Article 21 of the Rome Statute must be viewed as a deliberate attempt to modify this approach. There are important differences between these provisions which go to the heart of the international criminal law tradition. First, while Article 38 of the ICJ Statute places each of its sources of law on equal footing (with the exception of ‘subsidiary’ sources such as judicial decisions and teachings of the most highly qualified publicists), Article 21 of the Rome Statute establishes a hierarchy or pyramid of sources. Secondly, there is no explicit mention of international custom in Article 21 of the Rome Statute as there is in Article 38 of the ICJ Statute – the former

²⁰⁴ de Guzman, *supra* note 197 at 436.

referring to ‘principles and rules of international law’.²⁰⁵ Third, Article 21(3) of the Rome Statute entrenches internationally recognized human rights as infusing the ‘application and interpretation’ of every source of law, whereas no such provision appears in Article 38 of the ICJ Statute. Fourth, Article 21(1)(c) of the Rome Statute represents a significant evolution of the concept of ‘general principles of law’, which has been lauded because it “brings useful precision to the definition of general principles of law”.²⁰⁶ Alan Nissel argues that “this was the most controversial source codified and distinguishes Article 21 of the Rome Statute from Article 38 of the statute establishing the International Court of Justice.”²⁰⁷ Finally, the nature of prior decisions of the court is defined differently in Article 59 of the ICJ Statute compared to Article 21(2) of the Rome Statute. This issue of precedence will be considered in detail later.

Despite these significant differences between Article 21 of the Rome Statute and the general public international law sources, some prominent commentators continue to deny any break has been made with the traditional sources of public international law, as articulated in Article 38 of the ICJ. These scholars still hold to the view, in the face of the plain wording of Article 21 and the record of the negotiations surrounding it, that public international law continues to reign within the institutions created by the Rome Statute. In other words, they deny that it will be applying a law *sui generis*. Cherif Bassiouni argues that Article 10 of the Rome Statute “requires the application of international law

²⁰⁵ “While it is clear that custom is included in Article 21[(1)(b)], it appears that the reason why ‘custom’ was not explicitly mentioned was because the concept of gradually evolving custom was considered too imprecise for the purposes of international criminal law”: Alan Nissel, “Continuing Crimes in the Rome Statute” (2004) 25 Michigan Journal of International Law 653, n. 142 (Lexis).

²⁰⁶ Pellet, *supra* note 197 at 1082.

²⁰⁷ Nissel, *supra* note 205, n. 19.

whose four sources are listed in Article 38 of the Statute of the International Court of Justice”.²⁰⁸ Article 10 of the Rome Statute provides: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law *for purposes other than this Statute.*”²⁰⁹

Bassiouni’s argument is quite weak and his denial that the international criminal law world changed after Article 21 is not convincing. It may be easily dispatched by focusing on the explicit wording in Article 10 of the Rome Statute which states ‘for purposes other than this Statute’. Therefore, for the purposes of the Statute, Article 21 would be wholly and completely applicable. It would be impossible for the judges to deny it. Additionally, the ICC, as a creature of the Rome Statute, is governed by this treaty as its constitutional document. Despite the customary nature in international law of the sources articulated in Article 38 of the ICJ Statute, the ICC is bound first to consider the provisions of its own statute which has been crafted for the specific purposes to which the ICC is directed. It is entirely indefensible to argue that an international court should disregard a provision in its own statute in favor of an analogous, but different, provision in another international court’s statute. Such an approach is dictated by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, which properly and squarely applies to the interpretation to be given to the Rome Statute itself. Interestingly, Bassiouni agrees that the ICC must apply these interpretive canons, making his argument circular.²¹⁰ Therefore, Article 21 of the Rome Statute represents a split from strict adherence to

²⁰⁸ Bassiouni, 2003, *supra* note 34 at 501.

²⁰⁹ ICC Statute, *supra* note 37, art. 10 [emphasis added].

²¹⁰ *Ibid.*

Article 38 of the ICJ Statute and in so doing, divorces international criminal law from the possibility of claiming public international law with its thousands of years of history and tradition as being the exclusive anchor for the law applied by the ICC in concrete cases.

Restraint in Judicial Law-Making & Institutional Change

Another important aspect of the international criminal law tradition which has been seriously challenged in the Rome Statute is the role of international judges as powerful agents for law-making. One of the leading commentaries on the Rome Statute describes the fundamental debate on the role of judges at the ICC, and how Article 21 came to become a battleground on the issue:

Two principle schools of thought emerged at the Preparatory Committee meetings regarding the appropriate degree of judicial discretion in discerning applicable law. A minority of States took the position that the principle of legality requires the virtual elimination of judicial discretion in the criminal law context. Any doubt as to the relevant legal provision should be resolved, according to this view, by direct application of the appropriate domestic law. The majority position, on the other hand, sought to accommodate the unique nature of the international legal order by allowing the judges to discern and apply general principles of international criminal law. Article 21 represents a compromise between these two schools of thought.²¹¹

There is no agreement, however, in the literature on whether the Rome Statute as a whole has effectively altered the scope of authority of international judges to ‘make law’. While some argue “Article 21, therefore, accords a great deal of discretion to the judges at the ICC”,²¹² others claim “they [the drafters] have shown a mistrust for the judge [sic] that is reflected in a large number of other provisions of the Statute.”²¹³ While the judges of the post-WWII and modern *ad hoc* tribunals were entrusted with adopting and amending their

²¹¹ de Guzman, *supra* note 197 at 436.

²¹² *Ibid.*, at 439.

²¹³ Pellet, *supra* note 200 at 1056.

Rules of Procedure and Evidence, this power is largely denied to the judges of the ICC. Pursuant to Article 51 of the Rome Statute, the ICC Rules of Procedure and Evidence (Rules) “shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.”²¹⁴ The amending procedure for these Rules is onerous and could prove problematic, requiring the same level of approval by the Assembly of States Parties.²¹⁵ Article 51(3) provides an exceptional procedure for provisional amendments of these rules by the judges: “in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties”.²¹⁶ For its part, Rule 63(5) of the ICC Rules of Procedure and Evidence prohibits any direct application of national laws, reinforcing the authority of Article 21 in a redundant manner: “[t]he Chambers shall not apply national laws governing evidence, other than in accordance with article 21.”²¹⁷

One commentator has already raised the dilemma of “what happens if the next session of the Assembly of States Parties rejects a provisional rule adopted in such circumstances?”²¹⁸ If decisions under the provisional rule were void, the judicial independence of the ICC could be threatened. If they were not, the accused could claim unfairness in application of the rules. The unacceptability of this compromise will likely

²¹⁴ ICC Statute, *supra* note 37, art. 51(1).

²¹⁵ *Ibid.*, art. 51(2).

²¹⁶ *Ibid.*, art. 51(3).

²¹⁷ *Rules of Procedure and Evidence*, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., New York, 3-10 September 2002, ICC-ASP/1/3 - 10, r. 63(5), online: ICC <[http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records\(e\).pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records(e).pdf)> [ICC Rules].

²¹⁸ Pellet, *supra* note 200 at 1065.

lay dormant until it arises in a concrete case. It is a significant risk that would be irresponsible for the ICC to ignore. An even more serious problem relates to the fact that the Rome Statute itself contains “provisions of a procedural nature [that] could have been included in the Rules”.²¹⁹ If problems relating to those procedural rules arise during the course of a proceeding, the judges of the ICC would not have recourse to the ability to provisionally amend the rule, since it would be a statutory provision beyond their reach. The likelihood of these problems materializing should not be ignored, given that the judges of the modern *ad hoc* tribunals had to frequently amend their Rules of Procedure and Evidence to respond to challenges that arose in concrete cases.

A less serious limitation on the law-making abilities of the ICC judges is existence of the Elements of Crimes which are also adopted by two-thirds of the Assembly of States Parties. Article 9 of the Rome Statute provides that the Elements of Crimes “*shall assist* the Court in the interpretation and application of article 6, 7 and 8 [genocide, crimes against humanity, and war crimes].”²²⁰ The combination of the obligatory term ‘shall’ with the permissive term ‘assist’ is strange. Again, the reason for this lies in the nature of the Rome Statute as a negotiated treaty: “[s]ome delegates, led by the US, wanted the Elements of Crimes to bind the ICC judges so as to ensure certainty and clarity of the law of the ICC Statute. Other delegations opposed restriction on the ICC judges in their interpretation of international criminal law.”²²¹ The International Committee of the Red Cross (ICRC) commentary on the Elements of Crimes insists they “are to be used as an

²¹⁹ *Ibid.*, at 1063.

²²⁰ See ICC Statute, *supra* note 37, art. 9 [emphasis added].

²²¹ Kittichaisaree, *supra* note 11 at 51.

interpretative aid and are not binding upon the judges. The elements must ‘be consistent with this Statute’ and it should be emphasized that consistency with the Statute must be determined by the Court.”²²²

Notwithstanding the apparent limitations on their law-making powers, it has been postulated “that the judges will interpret the text [of Article 21], at least partially, so as to recover the powers inherent in all courts, of which the drafters of the Statute clearly wanted to deprive them.”²²³ While this may be true of substantive law given the non-binding nature of the Elements of Crimes and their cursory nature, within the realm of procedural and evidentiary law, the foregoing analysis demonstrates that there has been a genuine shift against judicial discretion.

Deepening Cleavages Between Humanitarian Protection & Fairness to Accused

Rather than attempting to reconcile the tension inherent in the international criminal law tradition between extending humanitarian protection versus ensuring fairness to the accused, the Rome Statute has only deepened these cleavages. The implications of this entrenchment of competing ideals within the law and institutions of the ICC are severe since they go to the very foundations of international criminal law. It is not difficult to envisage a show-down at the ICC of the type that took place at the ICTY Appeals Chamber in *Erdemović*. Indeed, the tone of the literature in this regard is particularly

²²² Knut Dörmann *et al.*, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2002) at 8 [emphasis added].

²²³ Pellet, *supra* note 200 at 1053.

bitter as the tensions between criminal lawyers and human rights activists are laid bare. There are both substantive and institutional aspects of this phenomenon.

Extending humanitarian protection inevitably occurred in the Rome Statute, given that numerous humanitarian organizations were involved in negotiations. The Rome Statute is not merely a codification of existing law. For example, the ICTY Trial Chamber in *Kupreškić* found that Article 7(1)(h) of the Rome Statute on persecution as a crime against humanity “is not consonant with customary international law”,²²⁴ and therefore refused to follow it.

Enhancing fairness to the accused is also embedded in the Rome Statute, similarly flowing from the efforts of human rights and criminal law advocates during the negotiations. It has been argued that there are many examples of the “‘victory’ of the criminal law approach over the internationalist vision”.²²⁵ In particular, it has been asserted that “the word ‘custom’ was excluded [in Article 21], [...] due to the fact that the criminal lawyers, whose influence increased during the drafting of the Statute, opposed it in the name of an erroneous conception of the principle of the legality of offences and punishment.”²²⁶ The need for clarity in provisions holding individuals criminally responsible is repeatedly stressed in the commentary on Article 21.²²⁷

²²⁴ *Kupreškić*, Trial Judgement, *supra* note 173, para. 580.

²²⁵ Pellet, *supra* note 200 at 1064, 1058.

²²⁶ *Ibid.*, at 1071; Pellet’s language is strong and borders on visceral as he earlier stated at 1057: “The result of a veritable brainwashing operation led by criminal lawyers, with the self-interested support of the United States, this argument is unacceptable.”

²²⁷ See Verhoeven, *supra* note 202 at 10.

International human rights law, which operated as a powerful normative vehicle at the *ad hoc* tribunals has become formally entrenched in the applicable law of the ICC, and infuses other sources. While no one would disagree that international human rights norms must inform international trials, Article 21 has taken the unprecedented step of raising all such norms to the levels of a quasi-constitutional status in a manner that can allow the judges of the ICC to effectively rewrite international criminal law with the stroke of a pen. Article 21(3) of the Rome Statute “mandates that the interpretation of the Statute should ‘be consistent with internationally recognized human rights’”. Though this phrase obviously refers to the rights of the accused, it can also be read to include the rights of the victims, which opens the door to a more aggressive mode of prosecution.”²²⁸ Under this view, with respect to the accused, the ‘application and interpretation’ of the sources of law in Article 21(1) must be consistent with human rights, such that “procedural rules must be construed so as to not infringe the right to a fair trial”.²²⁹ More controversially, Article 21(3) may have the effect of “authorizing the Court to hold such a norm [that is in violation of internationally recognized human rights] to be ‘*ultra vires*’ and thus inapplicable.”²³⁰ Notably, Article 21(3) does not simply refer to *jus cogens* norms, or even “*fundamental* human rights, traditionally quoted as examples of preemptory rules, but to all internationally recognized human rights.”²³¹

²²⁸ George P. Fletcher and Jens David Ohlin, “Reclaiming Fundamental Principles of Criminal Law in the Darfur Case” (2005) 3 *Journal of International Criminal Justice* 539 at 552 (Westlaw).

²²⁹ Verhoeven, *supra* note 202 at 14.

²³⁰ Pellet, *supra* note 200 at 1081; see also George E. Edwards, “International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy” (2001) 26 *Yale Journal of International Law* 323 (Lexis); see *contra* Verhoeven, *supra* note 202 at 14-5.

²³¹ Pellet, *supra* note 200 at 1081.

With respect to humanitarian protection, there are several provisions in the ICC Rules of Procedure and Evidence that have already relied on Article 21(3) of the Statute to extend humanitarian protection based on internationally recognized human rights. Allowances are made for the testimony of victims of sexual violence in Rule 72 of the ICC Rules of Procedure and Evidence, based in part on the need to comply with internationally recognized human rights.²³² Likewise, Rule 145(2)(b)(v) of the ICC Rules of Procedure and Evidence identifies as an aggravating circumstance in sentencing: the “[c]ommission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3”.²³³

From an institutional perspective, a formal division has been created in the Rome Statute between judges with criminal law backgrounds and those with international law backgrounds. There will be no unified bench at the ICC. The appointment of judges at the ICC departs from the practice of the modern *ad hoc* tribunals which merely required sufficient geographical distribution as the dominant criteria, by replacing it with subject-matter expertise as the main determinate of judicial appointments.²³⁴ Article 36 of the Rome Statute requires that every candidate for election as a judge be either an expert in criminal law and procedure *or* in international law, such as international humanitarian law or human rights.²³⁵ If this were not blatant enough, the candidates for judicial office are segregated into these two camps, appearing on separate ‘lists’ from which a proportion of

²³² See ICC Rules, *supra* note 217, art. 72(2).

²³³ *Ibid.*, r. 145(2)(b)(v).

²³⁴ Geographical distribution, representation of the principal legal systems of the world, and a gender balance are other considerations in the selection of ICC judges: see *ibid.*, art. 36(8).

²³⁵ ICC Statute, *supra* note 37, art. 36(3)(b). A candidate for judicial office may qualify to appear on both lists: *ibid.*, art. 36(5).

nine criminal law-qualified judges is selected for every five international law-qualified judges.²³⁶ The brand of being a ‘criminal law judge’ or an ‘international law judge’ remains even after their election. Article 39 of the Rome Statute on the composition of Chambers states:

[...] The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.²³⁷

The practical justification for this rule may be valid, but it has the very negative side-effect of formally entrenching and, perhaps, exacerbating a fundamental conflict of vision behind the international criminal law tradition – pitting two groups within it against one another. While neither body of judges can be taken to be monolithic in their views, there is a risk of that the ICC will over time develop a highly polarized bench of the type that took place in the ICTY Appeals Chamber in *Erdemović*. This would be a regressive step in the development of international criminal law that would cast doubt on its legitimacy as law. One solution is to favour judicial candidates who are qualified as experts in ‘international criminal law’ over time, rather than ‘criminal law’, or ‘international law’, such that they qualify for both lists. Over time, such candidates will grow in number.

Ongoing Role of Transnational Common Laws

Recalling that one of the aims of Article 21 of the Rome Statute is to fill gaps in the law, and given that Glenn’s theory of transnational common laws operates to fill gaps where

²³⁶ *Ibid.*, art. 36(5).

²³⁷ *Ibid.*, art. 39.

there are no particular rules applicable,²³⁸ the question that must be answered is whether Article 21 opens the door to resort to such transnational common laws. At least from a theoretical perspective, an affirmative answer may be reasonably given to this question. More troubling, however, is that the final element of Glenn's theory is given a home in Article 21, namely, that different law may apply to different accused. In the context of criminal proceedings this is a challenge to the rule of law.

Given that Article 21 is a hierarchical delineation of sources of law, the final source of last resort is where we must look for transnational common laws to operate. Article 21(1)(c) provides as a last resort that the ICC shall apply "[...] general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."²³⁹ Despite complaints of complexity in this articulation, there is an emerging consensus in the literature that this provision confers "a wide discretionary power"²⁴⁰ on the judges, "will provide ample opportunities for judicial creativity",²⁴¹ "allows the ICC to resort to drawing inspiration from case law in the criminal field decided by national courts of the various legal systems of the world",²⁴² and leaves it to judicial discretion to determine

²³⁸ See discussion in Chapter 2 based on Glenn, *On Common Laws*, *supra* note 98 at 62, 45.

²³⁹ ICC Statute, *supra* note 37, art. 21(1)(c).

²⁴⁰ Pellet, *supra* note 200 at 1075.

²⁴¹ Gennady M. Danilenko, "The Statute of the International Criminal Court and Third States" (2000) 21 *Michigan Journal of International Law* 445 at 490 (Lexis).

²⁴² Kittichaisaree, *supra* note 11 at 52.

which legal systems they will consider²⁴³ with the most likely candidates being “reduced to a small number in the contemporary world: the family of civil-law countries, the common law, and, *perhaps*, Islamic law.”²⁴⁴ These views aggregate to make a powerful case that the basic characteristics of transnational common laws exist in Article 21(1)(c) of the Rome Statute: that they are non-binding but persuasive laws, that may fill gaps where particular law is silent, and depend on collaboration among judges.

This leaves the most controversial aspect of Glenn’s theory of transnational common laws to be considered: namely, that it contemplates the possibility of different law applying to different people. As noted in Chapter 2, this characteristic has not been clearly operating in this tradition in the past. However, Article 21(1)(c) of the Rome Statute may have brought it home, by allowing resort to “the national laws of States that would normally exercise jurisdiction over the crime”.²⁴⁵ The drafting history of this provision sheds some light on what is meant by the States that would ‘normally exercise jurisdiction’. An earlier proposal identified these as “first to the national law of the State where the crime was committed, second to the laws of the State of nationality of the accused, and third to the laws of the custodial State.”²⁴⁶ Given that this specific proposal was considered, but not adopted, it could also reasonably be held that based on passive personality jurisdiction under international law, the national laws of the victim’s State could also be consulted in

²⁴³ de Guzman, *supra* note 197 at 444.

²⁴⁴ Pellet, *supra* note 200 at 1073-4 [emphasis added]; one is indeed hard pressed to find references to Islamic law, or other non-Western traditions, in the jurisprudence of the modern *ad hoc* tribunals.

²⁴⁵ ICC Statute, *supra* note 37, art. 21(1)(c).

²⁴⁶ de Guzman, *supra* note 197 at 444.

the case of an international armed conflict, systematic attack, or genocide.²⁴⁷ It is not possible to interpret Article 21(1)(c) of the Rome Statute to authorize applying the particular law of only one of these States, since it refers in the plural to that ‘national laws of States’. Therefore, Article 21(1)(c) would operate to fill gaps first by considering legal systems (or traditions) of the world seeking broad consensus. If it did not find such agreement, as in *Erdemović*, then it would examine the smaller subset of national laws that would ordinarily apply on the facts of the particular case. While there could be multiple national laws applicable, in cases of non-international armed conflicts, it is conceivable that only one State would normally have jurisdiction.

For example, in the Uganda situation presently before the ICC, where a perpetrator is a member of the Lord’s Resistance Army and a Ugandan national, the conflict is in northern Uganda, the victim is a Ugandan child soldier, and if the accused is apprehended and held in custody in Uganda before transfer to the ICC, then only Uganda would ‘normally exercise jurisdiction’ – only Ugandan law would be applicable as a last resort. In the end, however, it could be rendered inapplicable if it is “inconsistent with this Statute and with international law and internationally recognized norms and standards.”²⁴⁸ For example, a rule of Ugandan law which violates international norms would be inapplicable. This would be the ultimate situation of *non-liquet*. There would, theoretically, be no answer. If, however, the Ugandan law met this requirement, it would be applied by the ICC. In a case dealing with another non-international armed conflict,

²⁴⁷ Universal jurisdiction is not relevant here since it simply bring us back to the earlier broad analysis of legal systems of many States.

²⁴⁸ ICC Statute, *supra* note 37, art. 21(1)(c).

that law could be applicable. We are thus faced with the possibility of different law applying to different accused.

For scholars that have seriously considered this provision's implications (and there are not many), there has been an allergic reaction to this possibility but they have fallen short of recognizing that Article 21 has the potential to undermine the rule of law.²⁴⁹ Margaret McAuliffe de Guzman, for example, notes that this "particularized approach would undermine the consistent application of the law to different accused."²⁵⁰ Jose Alvarez also argues against the possibility of specific national law being ultimately of last resort, but provides no basis for his argument: "It appears that what is contemplated is the comparative use of local law - that is, that judges look to the body of local laws in general in order to infer commonly accepted principles among a variety of legal systems. The use of, for example, pre-existing Rwandan law as to the definition of 'complicity,' if the acts are committed by a Rwandan national within Rwanda, is not apparently authorized."²⁵¹ Even if we assume that Alvarez is correct in assuming that complicity could not be defined based on the other sources of law in Article 21, he fails to identify which States, other than Rwanda, would ordinarily exercise jurisdiction in his examples – thus bringing

²⁴⁹ Before considering these reactions, it is notable that at least one State has issued a reservation to the Rome Statute which expressly calls on the ICC to apply its national law when sentencing its nationals for any crimes of which they are convicted.

See "Rome Statute of the International Criminal Court: Declaration and Reservations", online: United Nations <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>>:

"Honduras – 13 July 2004[...] the Republic of Honduras declares its willingness to accept persons sentenced by the Court, provided that such persons are of Honduran nationality, the Court has decided their cases pursuant to article 21, paragraph 1 (c), and the terms of their sentences are equal to or less than the maximum terms permitted by Honduran law for committing the crimes of which they have been convicted."

²⁵⁰ de Guzman, *supra* note 197 at 444.

²⁵¹ Jose E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda" (1999) 24 Yale Journal of International Law 365 at n. 561 (Lexis).

their national laws into the analysis. It appears that his argument is not grounded in Article 21, but on a reaction to its probable outcome. Again, there is a denial in the literature surrounding Article 21 to recognize it for what it is. This brings us to the final major implication of Article 21 for the international criminal law tradition.

Nature of Prior Decisions of the ICC Indeterminate

A decision will need to be made by the ICC as to whether it will tolerate different law applying to different accused, or if after it makes the very first ‘particularized’ decision based on the subset of national laws of States that would normally exercise jurisdiction, it will opt instead to follow that decision in future cases as enabled under Article 21(2). The wording of this provision on the nature of prior decisions of the ICC is otherwise quite uninteresting, at least on first blush.²⁵²

The Court *may* apply principles and rules of law as interpreted in its previous decisions.²⁵³

It has been recognized that this is a “discretionary use of precedent [...that] represents a compromise between the common law approach to judicial decisions as binding precedent, and the traditional civil law view that judicial pronouncements in specific cases bind only the parties to the court.”²⁵⁴ Some commentators have predicted that the

²⁵² “Obviously, it would be sheer nonsense to affirm that the Court is forbidden to apply principles and rules as interpreted in its previous decisions”: Verhoeven, *supra* note 202 at 13.

²⁵³ ICC Statute, *supra* note 37, art. 21(2). With respect to treatment of the decisions of the modern *ad hoc* tribunals, they “are not binding on the recently established International Criminal Court (ICC), but interpretations of their governing rules and statutes will be persuasive authority due to their similarities with those of the ICC”: Kelly Buchanan, “Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists” (2004) 35 Victoria University of Wellington Law Review 609 at 651 (Lexis); see also Lucy Martinez, “Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems” (2002) 34 Rutgers Law Journal 1 at 17 (Lexis); see also Phyllis Hwang, “Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court” (1998) 22 Fordham International Law Journal 457 at 503 (Westlaw).

²⁵⁴ de Guzman, *supra* note 197 at 445.

ICC will simply adopt the same approach as the modern *ad hoc* tribunals, discussed in Chapter 2, to the treatment of their past decisions.²⁵⁵

It is possible that Article 21(2) of the Rome Statute carries more significant implications for the international criminal law tradition than has been envisaged so far. The first possibility, which is the approach of the modern *ad hoc* tribunals is to build a body of jurisprudence over time that initially draws heavily on sources external to the tribunals, but increasingly relies over time on the tribunal's own jurisprudence, looking outside their walls only to fill lacunae. This is also inherent in the tailored doctrine of precedence developed by the modern *ad hoc* tribunals, discussed in Chapter 2, such that an international criminal court "should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."²⁵⁶ This standard is far more stringent than that appearing in Article 21(2) of the Rome Statute, which is completely permissive in apparently allowing the judges to disregard or apply their prior decisions at will. It would be open to the judges at the ICC to follow the lead of the modern *ad hoc* tribunals. Indeed, many expect that "the ICC will facilitate the uniform and consistent application of international criminal law. By rendering judgments in concrete cases and developing a consistent jurisprudence, the ICC may clarify and even develop international criminal law."²⁵⁷ In this way, Article 21(2) of the Rome Statute would increasingly operate over time, as the ICC begins to decide issues in concrete cases, to resolve legal issues *without* resort to the other sources of law in Article 21(1)(b)-

²⁵⁵ Kittichaisaree, *supra* note 11 at 52.

²⁵⁶ *Ibid.*, para. 107.

²⁵⁷ Danilenko, *supra* note 241 at 490.

(c). This would suggest a phased development of the ICC's jurisprudence, and a gradual closing of the porous borders of international criminal law to other legal traditions.

The second possibility would be for the ICC to rely on Article 21(2) of the Rome Statute, likely in conjunction with Article 21(3), to proactively improve and develop international criminal law with only a loose concept of precedence. Any prior decision with which the judges simply did not agree based on prevailing human rights principles could be disregarded. A dynamic normative order would be created, constantly adapting to new situations and conflicts. This possibility would be fully justified based on the wording of Article 21.

In either of these models, the ICC has the potential through the operation of Article 21(2) to bring into existence "a new legal order of international law"²⁵⁸ – invoking the language used by the European Court of Justice to describe its *sui generis* character.

Conclusion

It has been recognized that Article 21 of the Rome Statute "bears the marks of the rush with which it was drafted and the process of compromise, which are ominous for its credibility."²⁵⁹ Whatever final conclusion on the merits of Article 21 of the Rome Statute one may reach, a critical examination of its theoretical underpinnings in light of the origins and development of international criminal law, reveals that it has significant ramifications for this emerging legal tradition.

²⁵⁸ Pellet, *supra* note 200 at 1053.

²⁵⁹ *Ibid.*, at 1083.

As has been seen, the normative super-structure that it purports to transplant into the international criminal law tradition differs in several important ways from earlier attempts to identify sources of law in this tradition. Article 21 of the Rome Statute removes the anchor of public international law that previously enabled international criminal law to develop, albeit with problems of its own. Article 21 differs in ways which will have an uncertain outcome on judicial decision-making in concrete cases, and threatens to undermine the rule of law by approving of different norms applying to different individuals. It also fails on a theoretical analysis to fulfill its aims of serving a gap filling function. The course of development of international criminal law before the ICC has been left to the discretion of the judges in many significant ways, despite formal attempts to limit their powers to do so. The operation of Glenn's transnational common laws remains the dominant explanatory vehicle to explain how judges at the ICC will likely address gaps in applicable law.

From an institutional standpoint, the ICC as a permanent judicial institution charged with applying Article 21 of the Rome Statute has entrenched cleavages through the process of appointment and empanelling judges which formalizes the tension between enhancing humanitarian protection versus maximizing fairness to the accused. This tradition would benefit from a clear and honest debate about these competing tensions and how they affect outcomes in concrete cases.

C O N C L U S I O N

International criminal law's emergence in the wake of the darkest periods of human history has placed pressures on it that few other areas of law have had to endure. It was forced to hold trials in advance of a clear articulation of what law the judges hearing those trials were to apply. The legitimacy of such an exercise after WWII faced serious challenges that have only resurfaced as Article 21 of the Rome Statute has attempted anew to refashion the normative structure underlying international criminal law. These challenges include the need to transcend often divergent national laws within untested and *ad hoc* institutions. In many instances international criminal law is at the intersection of well established legal traditions, most notably the common law and civilian traditions. This thesis has demonstrated that these established traditions do not simply apply as sources of customary international law, but as transnational common laws that are persuasive, non-binding, and derived by judges of international criminal tribunals in a highly discretionary manner in difficult cases. The benefit of *ad hoc* institutions is that we can learn from them and adapt, such that new generations of institutions may be crafted and improved upon. A major drawback of the creation of a permanent international criminal court is that prospects for reform are likely to be less expedient as institution inertia sets in over the years.

At the root of the discretionary selection by judges among the possible sources of norms is a competition between fundamental principles in the international criminal law tradition. On one hand, there is the need to enhance humanitarian protection to victims, an ideal embedded in international humanitarian law and particularly the Martens Clause. On the other hand, there is the aim of maximizing fairness to the accused, an ideal

enshrined in the growing body of international human rights law and codified in Article 21(3) of the Rome Statute of the ICC. This contest of values has been the pivotal turning point in resolving legal issues before the modern *ad hoc* tribunals in several difficult cases where the traditional sources of law have failed to provide an answer. In some of these decisions, this dilemma has been laid bare in the reasoning of the judges, whereas in others it has been kept hidden from stated reasons.

It is a finding of some significance that international criminal tribunals historically could not simply rely upon the general sources of public international law in resolving difficult cases. Even public international law failed to provide a sufficient anchor to international criminal law. It is perhaps even more significant looking forward that Article 21 of the Rome Statute of the ICC ends the monopoly of these general sources of public international law that were supposedly the foundation of the jurisprudence of the modern *ad hoc* tribunals, replacing it with a new normative regime that is highly variable and indeterminate.

As has been shown on a theoretical basis, Article 21 of the Rome Statute and the institutional design of the ICC have not resolved fundamental tensions and challenges inherent in the international criminal law tradition. Rather, they have exacerbated these ideological conflicts. Despite seeking to serve a gap filling function, Article 21 may fail to do so satisfactorily. While re-crafting the relationship between international criminal law and other national legal traditions, Article 21 serves to broaden the ability of judges to resort to transnational common laws. The ongoing development of international criminal law is an open question due to Article 21(2) of the Rome Statute, which leaves it

to the judges of the ICC to determine whether to adopt a system of non-binding precedence, or to opt for a dynamic jurisprudence which evolves in accordance with Article 21(3) of the Rome Statute to reflect changes in internationally recognized human rights. This means that until the ICC definitively and consistently articulates its position on the precedence of its decisions, the strength of the rule of law will be in doubt in its jurisprudence. Finally, the institutional design of the ICC only serves to deepen cleavages between the principles of enhancing humanitarian protection and ensuring fairness to the accused.

These insights lead to areas for further research as the work of the ICC begins in earnest and the modern *ad hoc* tribunals move towards completion. In particular, while a theoretical examination of Article 21 of the Rome Statute has revealed the prospect that it falls short of an ability to fill gaps in difficult cases, this hypothesis remains to be examined on an empirical basis. The ability of Article 21 to succeed in meeting both of its animating justifications (i.e. normative super-structure, and gap-filling) requires an empirical analysis of representative 'test cases' in light of Article 21. Whether Article 21 opens the door to resort to transnational common laws from an empirical perspective could also be considered in these 'test cases'. This could involve a practical application of Article 21 of the Rome Statute to resolve the type of substantive, procedural and evidentiary questions that will likely come before the ICC. This exercise of resolving representative 'test cases' by resorting to Article 21 could offer rich insights into the viability of this provision to provide a sufficient normative super-structure for the international criminal law tradition.

Conclusion

A great deal of trust has been placed in international criminal law. There are high but sometimes shaken expectations in its ability to administer international justice in a fair and efficient manner, while being receptive to national laws as well as emerging international human rights standards. These aspirations will be better served if more attention is paid to the foundational aspects of this emerging legal tradition which has been given a degree of permanency in the ICC.

B I B L I O G R A P H Y

Primary Sources

International Sources

Treaties

Charter of the International Military Tribunal, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

Charter of the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946, T.I.A.S. No. 1589.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, online: ICRC <<http://www.icrc.org>>.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, online: ICRC <<http://www.icrc.org>>.

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, online: ICRC <<http://www.icrc.org>>.

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, online: ICRC <<http://www.icrc.org>>.

International Court of Justice, *Statute of the International Court of Justice* in I.C.J. Acts and Documents, No. 5: Charter of the United Nations, Statute and Rules of Court (1978) and other Documents.

Bibliography

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

London Agreement of August 8th 1945, Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>>.

Permanent Court of International Justice, *Statute of the Court*, Series D, No. 1, 13 December 1920 (Leyden: A.W. Sijthoff's Publishing Company, 1926).

Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9.

Treaty of Versailles, 28 June 1919.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

UN Resolutions

Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, GA Res. 95(I), 11 December 1946.

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighboring States, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., Annex, U.N. doc S/955 (1994).

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory

of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., Annex, U.N. Doc. S/827 (1993).

Rules of Procedure and Evidence

International Criminal Court, *Rules of Procedure and Evidence*, Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess., New York, 3-10 September 2002, ICC-ASP/1/3 - 10, online: ICC <[http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records\(e\).pdf](http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records(e).pdf)>.

International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, U.N. Doc. ITR/3/Rev.1 (1995), as amended by U.N. Doc. IT/3/Rev.2 (1996) to U.N. Doc. IT/3/Rev.15 (2005).

International Military Tribunal, *Rules of Procedure*, 29 October 1945, Nuremberg Trial Proceedings Vol. 1, Rules of Procedure, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm>>

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Rules of Procedure and Evidence*, U.N. Doc. IT/32 (1994), as amended by U.N. Doc. IT/32 Rev.1 (1994) to U.N.Doc. IT/32/Rev.36 (2005).

Rules of Procedure of the International Military Tribunal for the Far East, 25 April 1946, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imtferul.htm>>.

Special Court for Sierra Leone, *Rules of Procedure and Evidence*, adopted on 16 January 2002, as amended to 14 May 2005, online: SCSL <<http://www.scs-sl.org/rulesofprocedureandevidence.pdf>>.

Jurisprudence

In the Matter of a Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić and Mićo Stanišić, Case No. IT-95-5-D, Trial Chamber, Decision on the Bosnian Serb Leadership Deferral Proposal, 16 May 1995.

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Trial Chamber, Judgement, 10 December 1998.

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Appeals Chamber, Declaration of Judge Patrick Robinson, 21 July 2000.

Prosecutor v. Bladoje Simić et al., Ex Parte and Confidential Opinion of Judge David Hunt on Prosecutor's Motion for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

Prosecutor v. Blagoje Simić et al., Case No. IT-95-9, Trial Chamber, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, 18 October 2000.

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Judgement, Appeals Chamber, 7 October 1997.

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Appeals Chamber, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997.

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, Appeals Chamber, 7 October 1997.

Bibliography

Prosecutor v. Drazen Erdemović, Case No. IT-96-22, Appeals Chamber, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997.

Prosecutor v. Drazen Erdemović, Case No. IT-96-22, Appeals Chamber, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997.

Prosecutor v. Dusko Tadić, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

Prosecutor v. Dusko Tadić, Case No. IT-94-1-T, Trial Chamber, Decision on Defence Motion on Hearsay, 5 August 1996.

Prosecutor v. Dusko Tadić et al., Case No. IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999.

Prosecutor v. Enver Hadžihasanović et al., Case No. IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002.

Prosecutor v. Enver Hadžihasanović et al., Case No. IT-01-47-PT, Appeals Chamber, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, 27 November 2002.

Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-AR72, Appeals Chamber, Partial Dissenting Opinion of Judge Shabuddeen: Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, Case No. ICTR-96-34-I, Trial Chamber, Decision on the Defence Motions Objecting to a Lack of Jurisdiction and Seeking to Declare the Indictment Void Ab Initio, 13 April 2000.

Bibliography

Prosecutor v. Jean Bosco Barayagwiza, Case No. ICTR-97-19-AR72, Appeals Chamber, Decision (Prosecutor's Request for Review of Reconsideration), 31 March 2000.

Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-A, Joint Separate and Concurring Opinion of Judge Wang Tieya and Judge Rafael Nieto-Navia, 3 June 1999.

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-A, Appeals Chamber, Separate Opinion of Judge Shahabuddeen, 31 May 2000.

Prosecutor v. Slobodan Milošević, Case No. IT-02-54-T, Trial Chamber, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004.

Prosecutor v. Théoneste Bagosora and 28 Others, Case No. ICTR-98-37-A, Appeals Chamber, Decision on the Admissibility of the Prosecutor's Appeal From the Decision of a Confirming Judge Dismissing an Indictment Against Théoneste Bagosora and 28 Others, 8 June 1998.

Prosecutor v. Zejnil Delalić, Case No. IT-96-21-T, Trial Chamber, Decision on the Motion on Presentation of Evidence by the Accused, May 1, 1997.

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21, Trial Chamber, Decision on the Motion to Allow Witness K, L, and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997.

Prosecutor v. Zoran Kupreškić, Case No. IT-95-16-T, Trial Chamber, Judgement, 14 January 2000.

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber, Judgement, 24 March 2000.

Bibliography

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeals Chamber, Declaration of Judge David Hunt, 24 March 2000.

United States of America v. Carl Krauch et al. (Farben Case), Case No. 6, Military Tribunal VI in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. VIII (United States: Government Printing Office, 1953).

United States of America et al. v. Hermann Wilhelm Göring et al., Trials of the Major War Criminals Before the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, Judgement, 1946.

———. Nuremberg Trial Proceedings Vol. 2, Preliminary Hearing, 14 November 1945.

United States of America et al. v. Gustav Krupp von Bohlen et al., Order of the Tribunal Granting Postponement of Proceedings Against Gustav Krupp von Bohlen, 15 November 1945, online: Avalon Project
<<http://www.mazal.org/archive/imt/01/IMT01-T143.htm>>.

United States of America v. Otto Ohlendorf et al. (Einsatzgruppen Case), Case No. 9, Military Tribunal II-A in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. IV, online: Avalon Project
<<http://www.mazal.org/archive/nmt/04/NMT04-T0460.htm>>.

Other Materials

Law No. 10 of the Control Council for Germany, Official Gazette of the Control Council for Germany, online: Avalon Project
<<http://www.yale.edu/lawweb/avalon/imt/imt10.htm>>.

Bibliography

Statute of the Special Court for Sierra Leone in Report the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCOR, 55th Sess., U.N. Doc. S/2000/915 (2000), online: SCSL <<http://www.sc-sl.org/scsl-statute.html>>.

United Nations Transitional Administration in East Timor, Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15, 6 June 2000, online: United Nations <<http://www.un.org/peace/etimor/untactR/Reg0015E.pdf>>.

National Sources

Military Manuals

Instructions for the Government of Armies of the United States in the Field, 24 April 1863, online: ICRC <<http://www.icrc.org>>.

Prussia (Kingdom). *War Book of the German General Staff* (Mechanicsburg, PA: Stackpole Books, 2005), translated by J.H. Morgan, originally published in 1915.

Other Materials

“Rome Statute of the International Criminal Court: Declaration and Reservations”, online: United Nations <<http://untreaty.un.org>>.

Royal Warrant – Regulation for the Trial of War Criminals (U.K.), 0160/2498, A.O. 81/1945, London, 18 June 1945, online: Avalon Project <<http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm>>.

Statute of the Iraqi Special Tribunal, 10 December 2003, online: Coalition Provisional Authority <http://www.cpa-iraq.org/human_rights/Statute.htm>.

Secondary Sources

Monographs

Atria, Fernando and D. Neil MacCormick, eds. *Law and Legal Interpretation* (Aldershot, England: Ashgate, 2003).

Bassiouni, M. Cherif. *International Criminal Law: A Draft International Criminal Code* (Germantown, MY: Sijthoff & Noordhoff, 1980).

———, ed. *International Criminal Law*, Vol. III, 2nd ed. (Ardsley, NY: Transnational Publishers, 1999).

———. *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers Inc., 2003).

Bantekas, Ilias and Nash, Susan. *International Criminal Law*, 2nd ed. (London: Cavendish Publishing Ltd., 2003).

Cassese, Antonio *et al.*, eds. *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford: Oxford University Press, 2002).

de Than, Claire and Edwin Shorts. *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003).

Dörmann, Knut *et al.* *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge: Cambridge University Press, 2002).

Ginsburgs, George. *Moscow's Road to Nuremberg: The Soviet Background to the Trial* (Boston: Martinus Nijhoff, 1996).

Glenn, H. Patrick. *On Common Laws* (Oxford: Oxford University Press, 2005).

Glueck, Sheldon. *War Criminals: Their Prosecution & Punishment* (New York: Alfred A. Knopf, 1944).

Haveman, Roelof *et al.*, eds. *Supranational Criminal Law: A System Sui Generis* (Antwerp: Intersentia, 2003).

Henckaerts, Jean-Marie and Louise Doswald-Beck, eds. *Customary International Humanitarian Law*, Vol. I and II, (Cambridge: Cambridge University Press, 2005).

Kittichaisaree, Kriangsak. *International Criminal Law* (Oxford: Oxford University Press, 2001).

Knoops, Geert-Jan Alexander. *An Introduction to the Law of the International Criminal Tribunals* (Ardsley, NY: Transnational Publishers, Inc., 2003).

May, Richard and Marieke Wierda. *International Criminal Evidence* (Ardsley, NY: Transnational Publishers, 2002).

May, Richard *et al.*, eds. *Essays on ICTY Procedure and Evidence* (The Hague: Kluwer Law International, 2001).

Safferling, Christoph J. M. *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001).

Sands, Philippe, ed. *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003).

Triffterer, Otto ed. *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

Werle, Gerhard, ed. *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005).

Zappalà, Salvatore. *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003).

Journal Articles

Alvarez, Jose E. "Crimes of States/Crimes of Hate: Lessons from Rwanda" (1999) 24 Yale J. Int'l L. 365 (Lexis).

Bogdan, Michael. "General Principles of Law and the Problems of Lacunae in the Law of Nations" (1977) 46 Nordic J. Int'l L. 37.

Buchanan, Kelly. "Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists" (2004) 35 Victoria Univ. Wellington L. Rev. 609 (Lexis).

Bush, Johnathan A. "*Lex Americana*: Constitutional Due Process and the Nuremberg Defendants" (2001) 45 St. Louis L. J. 515.

Cassese, Antonio. "Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg: Remarks Given at the Old State House" (1997) 12 Conn. J. Int'l L. 201.

Bibliography

- Danilenko, Gennady M. "The Statute of the International Criminal Court and Third States" (2000) 21 Mich. J. Int'l L. 445 (Lexis).
- Edwards, George E. "International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy" (2001) 26 Yale J. Int'l L. 323 (Lexis).
- Fletcher, George P. and Jens David Ohlin. "Reclaiming Fundamental Principles of Criminal Law in the Darfur Case" (2005) 3 J. Int'l Crim. Just. 539 (Westlaw).
- Hwang, Phyllis. "Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court" (1998) 22 Fordham Int'l L. J. 457 (Westlaw).
- Janis, Mark W. "Law, War and Human Rights: International Courts and the Legacy of Nuremberg: The Utility of International Criminal Courts" (1997) 12 Conn. J. Int'l L. 161.
- Quigley, John. "Soviet Influences on International Criminal Law in the Nuremberg Era" (1996) 7 Crim. L. F. 447.
- Martinez, Lucy. "Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems" (2002) 34 Rutgers L. J. 1 (Lexis).
- May, Richard and Marieke Wierda. "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha" (1999) 37 Colum. J. Transnat'l L. 725.
- Meron, Theodor. "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" (2000) 94 Amer. J. Int'l L. 78.

Bibliography

Mundis, Daryl A. "Completing the Mandates of the *Ad Hoc* International Criminal Tribunals: Lessons from the Nuremberg Process" (2005) 28 Fordham Int'l L. J. 591.

Nissel, Alan. "Continuing Crimes in the Rome Statute" (2004) 25 Mich. J. Int'l L. 653 (Lexis).

Paust, Jordan J. "History of International Tribunals Prior to Nuremberg: Selective History of International Tribunals and Efforts Prior to Nuremberg" (2003) 10 ILSA J. Int'l & Comp. L. 207.

Peters, Ellen Ash. "Symposium: Law, War and Human Rights: International Courts and the Legacy of Nuremberg: The Capacity of Judicial Institutions to Play and Affirmative Role in the International Protection of Human Rights: Implications for and from Domestic Law" (1997) 12 Conn. J. Int'l L. 219.

Scharf, Michael P. "The Prosecutor v. Dusko Tadić: An Appraisal of the First International War Crimes Trial Since Nuremberg" (1997) 60 Albany L. Rev. 861.

J. Verhoeven, "Article 21 of the Rome Statute and the Ambiguities of Applicable Law" (2002) 33 Neth. Y.B. Int'l L. 3.

Online Materials

International Committee of the Red Cross. "Treaties and Documents by Date", online: ICRC <<http://www.icrc.org>>.

Other Materials

Glenn, H. Patrick. "Transnational Common Laws" (undated).

A P P E N D I X

Statute of the International Court of Justice

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.²⁶⁰

Vienna Convention on the Law of Treaties

Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

²⁶⁰ ICJ Statute, *supra* note 31, art. 38.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.²⁶¹

Rome Statute of the International Criminal Court

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

* * *

Article 21

Applicable law

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

²⁶¹ *Vienna Convention on the Law of Treaties*, *supra* note 91, arts. 31-32.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.²⁶²

²⁶² ICC Statute, *supra* note 37, arts. 10, 21.